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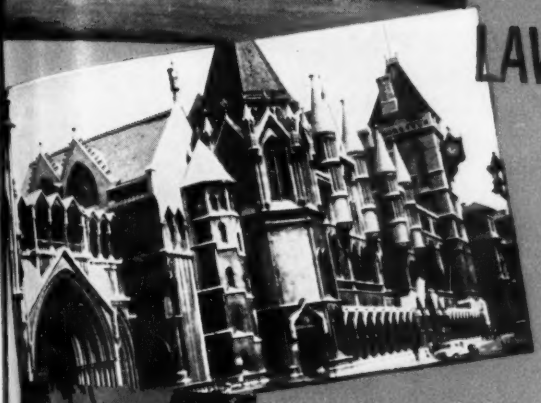
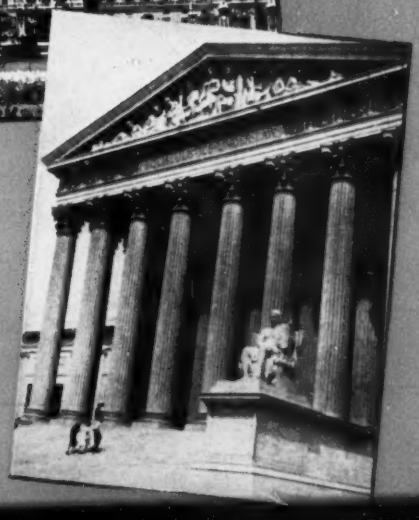
American Bar Association Journal





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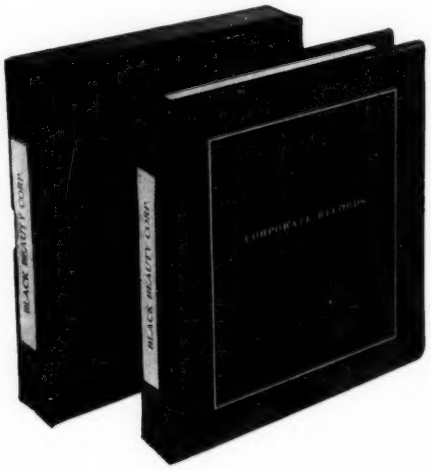

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August, 1960

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VOLUME 46

No. 8

American Bar Association JOURNAL

THE AMERICAN BAR ASSOCIATION JOURNAL is published monthly by the AMERICAN BAR ASSOCIATION at 1155 East 60th Street, Chicago 37, Illinois.

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The President's Page

John D. Randall

The Summing Up

This is the last page that I shall prepare as President of the American Bar Association. It is not without a certain sadness that I leave these columns as well as the office of President. The pleasure of working with one's fellow lawyers for the improvement of our profession is one shared by many men. The opportunity of doing it while occupying the office once held by such giants as David Dudley Field, Moorfield Storey, Frank B. Kellogg, William Howard Taft and Elihu Root, to mention only some who served during our early years, is given only to a few. One cannot serve as President of the American Bar Association without asking himself—almost daily—how he measures up to the high standards set by these, and other, illustrious predecessors.

If these men left any single principle of professional performance, it is this: know the full extent of your responsibilities as a member of a profession, then do all in your power to meet them.

The lawyer's responsibilities are many; he has a duty to his client, an obligation to our legal system and a responsibility to the community in which he shares the intellectual leadership.

The organized Bar has long recognized that the elimination of delay in our courts is one of its most important tasks. In many regions bar associations are making specific proposals which would tend to reduce court congestion. Some of these proposals are broad and imaginative and show clearly that lawyers are not afraid to experiment in order to improve our system. This same willingness to explore new avenues is apparent in the Bar's never ending effort to provide counsel in both civil and criminal matters to members of our marginal income groups. While we strive to improve our system of justice, we must at the same time honor our responsibility to the community.

There is a phase of our community responsibility that demands increased attention. We know that the American Bar has a responsibility to the international community. This is a responsibility-that is not easily met. We must begin by educating ourselves as to the role already played by law in the settlement of disputes between nations. I have in the past advocated the expansion of our continuing legal education program to take into account this new dimension of the American lawyer's responsibilities. I believe that continuing legal education should feature studies on comparative law as well as both private and public international law so that the American lawyer will be conversant with the methods used by attorneys in other lands to solve their problems. I shall continue to urge that we expand our effort for I believe it is the essential first step to extending the Rule of Law to new areas of international conduct.

While on the one hand the American lawyer is preparing himself to extend the rule of law there is another area in which he is already equipped to make a substantial contribution to the international community. In our less than two hundred years of our national existence, we have offered free land to landless immigrants; we have aided them to finance the purchase of their equipment and to protect themselves, in a measure, against the hazards of nature and the market prices. This is a rich experience. Any of the younger nations would, I am certain, welcome our technical assistance in developing their own systems of internal stability with justice. As the possessors of this reservoir of technical knowledge, we have the responsibility of making our legal experiences available on a co-operative basis to the young nations. It was with this responsibility in mind that I proposed to the American Bar Foundation that it examine the feasibility of establishing institutes in which the law leaders of the new nations could select those American legal methods that would be of value in their home lands.

The challenges to the American lawyer in this new decade are many. He can meet them only through co-operating effectively with his fellow lawyers. It is for this reason that a strong organized Bar is more important than ever before. In this regard, I am happy to report that throughout my travels during the past year I found state and local bar associations more effective than at any time in history.

This then is the responsibility of today's lawyer. I hope that during the past few months I may have contributed in some small measure to the growing awareness of the lawyers as to their professional responsibilities and the importance of the American Bar Association as an instrument for fulfilling these responsibilities.

Views of Our Readers

■ **Members of our Association are invited to submit short communications expressing their opinions, or giving information, as to any matter appearing in the Journal or otherwise, within the province of our Association. Statements which do not exceed 300 words will be most suitable. The Board of Editors reserves to itself the right to select the communications or excerpts therefrom which it will publish and to reject others. The Board is not responsible for matters stated or views expressed in any communication.**

Japanese Now Have a "Law Day" Too

An item of information which appears to be of considerable importance has just come to our attention which may be of interest to readers of the *Journal*.

Law Day was celebrated in Japan again this year under the sponsorship of Tri-Service American Military Lawyers, among whom were Colonel Nicholas R. Voorhis, Headquarters, U. S. Army Pacific; Lieutenant Colonel John S. Wilson, Headquarters, U. S. Army-Japan; Colonel George D. Bruch, Headquarters, Fifth Air Force; and Captain Richard J. Hogan, Headquarters, U. S. Naval Forces, Japan.

The principle speaker for the occasion was Chief Justice Kotaro Tanaka of the Supreme Court of Japan who gave his address in English, repeated in Japanese, to an audience of about three hundred lawyers and jurists, both American and Japanese. Noteworthy in the address of Dr. Tanaka was his comment that "We Japanese jurists, certainly inspired by the American example, made a resolution on the occasion of the Conference of the three branches of the judiciary, which took place on October 3 last year, to institute a 'Law Day'. Therefore, in order to emphasize respect for law we proposed to institute October 1 as 'Law Day' in Japan". He continued that he hoped that their annual celebration of Law Day would not be limited to a narrow circle of jurists but that it would be a movement which would develop a meaning for the people at large.

The expansion of the concepts of Law Day throughout the world can have nothing but beneficial effects. The movement is certainly one in which all members of the Association may be justly proud. It would be most appropriate that President Randall extend congratulations in behalf of the American Bar Association to the Japanese.

EDMUND BURKE, JR.
Captain, U. S. Navy
Honolulu, Hawaii

Less Sting in Death and Taxes?

Re: "Personal Injury Recoveries and the Federal Income Tax Laws" in the March, 1960, JOURNAL.

After the jury finishes figuring out the deceased's income tax returns for his life expectancy (which I am sure that they will enjoy doing, as who does not enjoy filling out income tax returns), let's see if they want to add a little bit back on for the following items which are not now recoverable in personal injury actions:

I. Investigation expenses
   a. Private detective service.
   b. Photographers.
II. Litigation expenses.
   a. Expert witness' fees.
   b. Cost of demonstrative evidence.
   c. Attorneys' fees.
III. Counseling fees for survivor.
   a. Ordinary expenditures.
   b. Investments.
IV. Probate proceedings.
   a. Court costs.
   b. Legal fees.
   c. Taxes.
V. Guardianship proceedings.
   a. Court costs.
   b. Legal fees.
VI. Interest on jury award, 10 per cent from date of defendant's negligence.
VII. Loss of consortium.
VIII. Loss to children of guidance, advice, chastisement, love and upbringing by reason of death of parent.

If these suggestions could be adopted then we could get a little of the sting out of both. (Death and taxes.)

WILLIAM J. THREADGILL
Tulsa, Oklahoma

Cold Feet (His Wife's) Cost Him Chief Justiceship

The letter of Arno H. Denecke, of Portland, Oregon, in the June, 1960, issue, about the wife of George H. Williams, nominated by President Grant to the office of Chief Justice, but whose appointment was later withdrawn, to which you give the caption "He Should Have Left His Wife at Home" was so interesting that it suggested to me the incident of the proffered appointment of Judge Scholfield to the office of Chief Justice by Grover Cleveland.

It seems (according to the biography of Melville Weston Fuller, by Willard L. King) that on the death of Chief Justice Waite, besides the pre-eminent qualities of ability and character required of his successor, President Cleveland insisted on certain other qualifications: the appointee must be under the age of sixty, must live in Illinois and must be a Democrat. Mr. Fuller had all these qualifications, but so did at least one other gentleman, Judge John Scholfield, of the Supreme Court of Illinois, who was recommended for the appointment by Mr. Fuller. According to Mr. King, the President authorized a certain Congressman to sound out Judge Scholfield to see if he would accept the appointment. Judge Scholfield refused: "He told some of his intimates with tears in his eyes, that he would give his good right arm to

(Continued on page 804)

published monthly

American Bar Association Journal

the official organ of the American Bar Association

The objects of the American Bar Association, a voluntary association of lawyers of the United States, are to uphold and defend the Constitution of the United States and maintain representative government; to advance the science of jurisprudence; to promote the administration of justice and the uniformity of legislation and of judicial decisions throughout the nation; to uphold the honor of the profession of law; to apply its knowledge and experience in the field of the law to the promotion of the public good; to encourage cordial intercourse among the members of the American Bar; and to correlate and promote such activities of the bar organizations in the nation and in the respective states as are within these objects, in the interest of the legal profession and of the public. Through representation of state, territory and local bar associations in the House of Delegates of the Association, as well as large membership from the Bar of each state and territory, the Association endeavors to reflect so far as possible, the objectives of the organized Bar of the United States.

There are eighteen Sections for carrying on the work of the Association, each within the jurisdiction defined by its by-laws, as follows: Administrative Law; Antitrust Law; Bar Activities; Corporation, Banking and Business Law; Criminal Law; Family Law; Insurance, Negligence and Compensation Law; International and Comparative Law; Judicial Administration; Labor Relations Law; Legal Education and Admissions to the Bar; Mineral and Natural Resources Law; Municipal Law; Patent, Trademark and Copyright Law; Public Utility Law; Real Property, Probate and Trust Law; Taxation; and the Junior Bar Conference. Some issue special publications in their respective fields. Membership in the Junior Bar Conference is limited to members of the Association under the age of 36, who are automatically enrolled therein upon their election to membership in the Association. All members of the Association are eligible for membership in any of the other Sections.

Any person who has been duly admitted to the Bar of any state or territory of the United States and is of good moral character is eligible to membership in the Association on endorsement, nomination and election. Applications for membership require the endorsement and nomination by a member of the Association in good standing. All nominations made pursuant to these provisions are reported to the Board of Governors for election. The Board of Governors may make such investigation concerning the qualifications of an applicant as it shall deem necessary. Four negative votes in the Board of Governors prevent an applicant's election.

Dues are $20.00 a year, except that for the first two years after an applicant's admission to the Bar, the dues are $5.00 per year, and for three years thereafter $10.00 per year, each of which includes the subscription price of the Journal. There are no additional dues for membership in the Junior Bar Conference or the Section of Legal Education and Admissions to the Bar. Dues for the other Sections are as follows: Administrative Law, $5.00; Antitrust Law, $5.00; Bar Activities, $2.00; Corporation, Banking and Business Law, $5.00; Criminal Law, $2.00; Family Law, $5.00; Insurance, Negligence and Compensation Law, $5.00; International and Comparative Law, $5.00; Judicial Administration, $3.00; Labor Relations Law, $6.00; Mineral and Natural Resources Law, $7.00; Municipal Law, $5.00; Patent, Trademark and Copyright Law, $5.00; Public Utility Law, $5.00; Real Property, Probate and Trust Law, $5.00; Taxation, $8.00.

Blank forms of proposal for membership may be obtained from the Association offices at 1155 East 60th Street, Chicago 37, Illinois. An application for membership should be accompanied by a check for dues in the appropriate amount as follows: $20.00 for lawyers first admitted to the Bar in 1955 or before; $10.00 for lawyers admitted in 1956, 1957 and 1958; and $5.00 for lawyers admitted in 1959 or later.

Manuscripts for the Journal

■ The JOURNAL is glad to receive from its readers any manuscript, material or suggestions of items for publication. With our limited space, we can publish only a few of those submitted, but every article we receive is considered carefully by members of the Board of Editors. Articles in excess of 3000 words, including footnotes, cannot ordinarily be published.

Manuscripts submitted must be typewritten originals (not carbon copies) and must be double or triple spaced, including footnotes and any quoted matter. The Board of Editors will be forced to return unread any manuscript that does not meet these requirements.

Manuscripts are submitted at the sender's risk and the Board assumes no responsibility for the return of material. Material accepted for publication becomes the property of the American Bar Association. No compensation is made for articles published and no article will be considered which has been accepted or published by any other publication.

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(Continued from page 800)

be Chief Justice of the United States, but that he couldn't take his wife to Washington. She was a woman of sterling worth, but of frontier habits. She went barefoot in the summer. Scholfield's friends sympathized but agreed with him." And so Mr. Fuller got the appointment.

JAMES M. ROSENTHAL
Pittsfield, Massachusetts

Maybe a Married Man Wrote the Copy

The use of a wrong word in the advertisement by the Matthew Bender & Company, which appears on page 467 of the May, 1960, *Journal*, gave me a particular chuckle.

When I was a student in the University of Wisconsin Law School I used the term "anti-nuptial contract" in a course on domestic relations. The roof fell in on me when Professor Nathan Feinsinger suggested that I apparently believed in contracts which prevented marriage.

It is a pleasure to see that even law book companies can sometimes make the same humorous mistake.

I know an error of this type is not the fault of the publication, but I couldn't resist dropping you a note.

Keep up the good work in publishing a very excellent magazine.

LESTER W. BRANN, JR.
Milwaukee, Wisconsin

Abolish the Contingent Fee

The item in the May 15 issue of the *American Bar News* touching the *Reader's Digest* article criticizing contingent fees may well underscore the gravity of unsubstantiated charges of abuses by lawyers, and answering such charges may mitigate the onus attaching to this unhappy venture of the Bar into the market place. But erasure surpasses mitigation and that can come only by conceding the uncompromisable clash between Bar professionalism and the contingent fee.

The whole concept of such a fee basis depends upon the assumption that in a large number of cases, essentially negligence claims, the plaintiff loses, and that if he does not win he cannot compensate his counsel. To assure a claimant competent counsel whatever the limitation of the claimant's means, someone devised the contingent fee system which gives a winning counsel compensation for services rendered based on a sort of double-or-nothing gamble. In the first place the assumption is unwarranted for in all but the most flimsy of claims plaintiffs do receive awards. There remain, then, the few cases where the claimant loses, and under the system, his counsel receives nothing for his services. In these it is most likely, barring the inevitable border-line case, that there is no merit anyway and action brought only because of the gambling instinct the contingent fee system fosters.

Then what of the border-line case? We are told that if the claimant of limited means is to have adequate counsel only the contingent fee can provide it. But is this true? Are conditions so different in the United States from those in other countries which do not tolerate such practices? And must the Bar pay such a price in loss of public esteem to assure adequate counsel to all? Why not a provision in the collision clause of the automobile liability policy covering reasonable counsel fees, something akin to the reimbursement of surgery through Blue Shield contracts? Would that actually not even lower policy rates in the long run?

The public must have competent legal aid and the lawyer must be paid for the hours he devotes to giving that aid however the case may terminate—parallel inescapables if the Bar is to continue as a true profession. But the contingent fee system is a price the Bar cannot afford for this, and one the public may ultimately reject altogether. Instead of ferreting out abuses in the system, or worse yet, instead of lobbying for legislative interference with the judicial power to suppress excessive contingent fees (*vide* New York), we lawyers should set ourselves to working out a substitute for this practice which so degrades the profession in the public eye.

HAROLD F. PORTER, JR.
New York, New York

Two More Selden Society Books

The Selden Society's work is indeed as significant and as interesting as Mr. Wiener describes it in the June *Journal* (page 611). He might also have mentioned two remarkable volumes for the years 1892 and 1897, respectively numbers 6 and 11 of the series. These were prepared by an outstanding scholar, Reginald G. Marsden, whose master work, *On Collisions at Sea*, is part of the English Library of Shipping Law. Marsden's two Selden volumes are entitled: *Select Pleas in the Court of Admiralty*. They include his essay of eighty-eight pages which, after seventy years, is the standard basis for any re-examination of the foundations of the maritime jurisdiction and the admiralty law in England. His "select pleas" embrace three periods: 1390-1404, 1527-1545, and 1547-1602. Thus, they begin in the reign of Richard II and end with the death of Elizabeth I. That depicts the normally developed jurisdiction and law before the conflicts of the seventeenth century and the jealousies between Kings Charles and James and Parliament, and between rival groups of judges struggling for mastery, in the King's Counsels, with Cromwell, and in the Restoration period, upset orderly thought and action until peace was restored when Victoria came to the throne.

An account of the work and influence of the Selden Society is incomplete without a reference to Marsden's fundamental researches, which were among the first projects of the series.

ARNOLD W. KNAUTH
New York, New York

Peace Is Better than National Sovereignty

Mr. Charles W. Briggs, writer of "The Cloudy Prospects for 'Peace Through Law' " [May issue, page 490] appears to adhere to the majority but erroneous view that believers in continued unfettered sovereignty are realists, whereas believers in anything else are emotional dreamers. The fact is that military technology has reversed the situation, having made the "realists" into nostalgic dreamers, and the "dreamers" into pragmatists.

Mr. Briggs seems to feel that we have

the election of fighting or not fighting, stating: "At times they [men] prefer war." We have no such election. There *were* times when sane and admirable men rightly preferred war, but there no longer can be. To enter a nuclear war is to lose it. Though the "next" war be fought for the highest of ideals it can only produce the smallest of results—radioactive particles of humanity.

The entire course of history teaches that the generation of deterrents does not prevent war. Though we win the science and space race, the buttons will someday be pressed to launch the missile barrages that will prevent subsequent wars by the blunt but effective process of substantially eliminating the species.

Our only "election" is to take effective steps toward eventual disarmament, which steps must include some limitations on complete sovereignty. We must cease to debate whether to take such steps, and instead concentrate on what steps to take and how to take them. Let us not merely issue negative statements concerning the impossibility of the utterly necessary. Let us instead put forth positive efforts to see to it that what is done is effective, and leaves to our country as much sovereignty as is possible under the present deplorable circumstances.

I wish sincerely that missiles and H-bombs had never been invented, and that we could follow a course of complete sovereignty and even isolationism. I would love to turn back the clock, but as a "dreamer" I am sufficiently practical to know that we cannot.

RICHARD L. GAUSEWITZ
Santa Ana, California

Mr. Kappes and Free Enterprise

To explain the fallacies in "The Second American Revolution: Free Enterprise under the Bill of Rights" (June, 1960), by Charles W. Kappes, Jr., would require a letter longer than his six pages. I shall refer to one fundamental, albeit typical, instance of confusion in the welter of learned references.

In apparent justification of our departure from historical free enterprise,

(Continued on page 807)

How Western Electric Helps to Keep Down the Cost of Telephone Service

There are great benefits for telephone users in the fact that the Bell System has its own manufacturing and supply unit

The Western Electric Company is an integral part of the Bell System —an essential member of the Bell System team serving you.

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The value of the close integration of Bell System research, manufacture, operation and supply has been proved by many years of successful operation.

No other way would work out nearly so well or so economically for both the public and the country.

BELL TELEPHONE SYSTEM

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its meaning undistorted, and the Jeffersonian ideal of freedom of the individual, Mr. Kappes cites the evils of several instances of monopoly with reinforcements of fraud. These he correctly connects with economic determinism, a doctrine which is espoused by Marxists.

But as the solution which the latter offer is faulty, so is Mr. Kappes': for instead of seeking ways to avoid monopoly, force, fraud, etc., he proposes attempts to pull in the opposite direction. Yet attempts to inject countervailing force by more government controls can at their remote best only take us further from the ideals of Jefferson and others in the philosophical and religious fields, to which we have given lip service.

Instead of decrying free enterprise, involving it with the concept of economic determinism, and looking to government to "produce" prosperity, we should be encouraged to eliminate the faults of the free enterprise system which make it unfree, while recognizing it as the best which has been developed by man; and, to those who are concerned with such matters, as based on the Eighth Commandment. (Mr. Kappes is not one of the latter: he refers to "the economic basis of our culture".)

It may be added that Mr. Kappes' examples of government in business prove no more than the need to avoid or control monopoly.

LLOYD BUCHANAN

Washington, D. C.

A Program for the Association

Professor Payne's article on "Lawyers and the Law of Economics" is a second brilliant article which you have published on this subject. (The other was the article by Leo Loevinger in the July, 1958, JOURNAL.) You are to be commended for your selection of this vital article as the first article of the issue.

As Professor Payne points out, with convincing support from statistics and authorities, (1) the lawyers have fallen behind financially; (2) the nation suf-

fers from the outmoded procedures and delays of law practice; (3) the nation is losing the services in the legal profession of many talented young men.

His article should be a challenge to the leading professional organization of lawyers. It should be a challenge to the leaders of the American Bar Association to put first things first, and to do something about the most important problems.

Some years ago, I submitted a resolution which was ruled by the Resolutions Committee to be not within its sphere, in which I suggested that the newly elected President announce a program of matters to be accomplished during his administration. These matters would be treated as matters of primary and general interest and every member would be sent directly literature on them. It sometimes seems that the only items recognized as of general interest to the members are: the Annual Meeting and the drive to increase membership. Now I do not propose to repeal the law of human nature, which obviously makes both of these of general interest.

However, there should be priorities in other matters of importance.

I therefore propose for consideration by our membership at large and our leaders:

1. Every lawyer newly admitted to practice in all of the fifty states should be made a member of the American Bar Association without charge for the first year. After that, he is liable for regular dues.

2. Every lawyer of the American Bar Association should be solicited by the organization for activity in our committees. A method must be evolved to enable every member to make some contribution, and to be active in committee work, especially the new members. It is wrong to charge extra for committee activity.

3. The *Journal* should run a suggestion page wherein suggestions by the members are printed, and most important, an addendum by the Editor to each suggestion, showing to what Committee of the Association the idea has been referred for appropriate consideration.

4. It should be one of the primary functions and purposes of the officers and leaders of the American Bar Association to find ways and means of inspiring the imagination of the youth, and of the general public, of America, with the responsibilities, duties and opportunities of the practicing lawyer; to apprise the public through appropriate and dignified advertising, of this, and correspondingly, to take such action as will enhance and protect the conditions under which the American lawyer may so act.

A primer for the course of action to be followed is obviously the realistic article by Professor Payne outlining and detailing the obstacles to be overcome.

STANLEY H. BORAK

New York, New York

Stop Practicing Horse and Buggy Law

This will refer to the article "Law-

yers and the Laws of Economics", contained in the April issue of the *Journal*. Mr. Payne's article on legal economics, as well as approximately 99.44 per cent of all other articles on this subject, compares the income of the legal profession with that of the medical profession.

In my opinion a comparison of the incomes of the two professions should be preceded by a comparison of the respective services of the professions and the methods of making these services available to the public. Thirty-five or forty years ago medicine was practiced by the "country" or "family" doctor, who treated anything and everything. Since that time medical science has made great progress and with this progress the medical profession has encouraged study and research in particular fields of medicine. The profession has not only recognized specialized fields of medicine, but it has also done an excellent job of educating the public regarding these specialized practices. It would almost seem to go without saying that in order to sell your services to the public, you have to let the public know what services are available. The number of medical specialties which have been recognized and practiced since the old-time "country" doctor are too numerous to list completely...

The recognition of these specialties not only serves the public, it also serves the profession itself by encouraging additional study and research by the individual members.

Since the day of the "country" doctor, what has the legal profession done in the way of specialization, public education, and encouragement of additional study and research? The answer obviously is practically nothing. At least the man on the street knows, if he is having trouble with his eyes he should go to an ophthalmologist rather than an obstetrician. But what choice does the man on the street have if he has a complicated income tax case as compared with a divorce problem? He simply goes to the yellow pages of the phone book and picks an attorney at random.

The bar associations have encour-

aged lawyers today to handle any legal problem that comes into their office (some noted speakers have even stated that it is the *duty* of the lawyer to handle all legal problems regardless of their nature). Lawyers individually know they are not qualified to *properly* handle all such problems, and they will, among themselves at least, recognize certain specialized fields. The problem, however, is that the general public has been led to believe that all lawyers are qualified to handle all legal problems.

In the medical profession, many of the specialists also do general practice and there is no reason why this condition could not exist in the legal profession. But until the legal profession recognizes specialized fields of law and educates the public accordingly, it is going to continue to fall further behind the other professions every year. As lawyers, we cannot hope to compare financially with the other professions as long as we continue to practice horse and buggy law.

DONALD G. CORLEY
Jackson, Michigan

The Profession Is Overcrowded, He Says

The May 15, 1960, issue of the *American Bar News* contained facts on the low income of attorneys. President Randall in the June issue of the *Journal* attributes this to the fact that two thirds of the attorneys practice alone and suggests if three lawyers had joined together in a firm the income of each would be increased from $5,759 to $12,821, and if they organized five to a firm, the income of each would be $20,467. I respectfully disagree with this line of reasoning.

The fact is that the legal profession is overcrowded. If there were sufficient practice to keep all of the attorneys busy they would be making money whether they practice alone or in firms. The natural law of supply and demand prevails in law practice as in all other occupations and largely controls income. According to President Randall's reasoning, if the American lawyers would all organize themselves into firms of three to five lawyers there would suddenly be sufficient practice to keep them all occupied with earnings of $12,821 to $20,467 each.

Some savings can be effected when more than one attorney pays to maintain a library and they share secretarial services, but this is due to economy rather than income.

It may be quite true that law-trained men and women are somewhat in demand in government service and industry which is not primarily the practice of law.

I think it is somewhat cruel to hold out to young people who are preparing for a career that the legal profession is not overcrowded.

BENJAMIN E. BUENTE
Evansville, Indiana

Folger Library Director on Our Shakespeare Series

I am sure that members of the American Bar Association have sufficient humility in self-appraisal to be led to mend their ways by the following critique by Dr. Louis B. Wright, the distinguished Director of The Folger Shakespeare Library, appearing at page

5 of Report from the Folger Library, Vol. 9, No. 1, May 20, 1960:

LAWYERS' AMUSEMENT

The American Bar Association Journal during the past year has published several articles in which lawyers argue about the authorship of Shakespeare's plays with all the earnestness of a trial in court—and the same techniques. No one has yet pointed out to these gentlemen of the bar that persuasion is not factual evidence, and the methods of winning a case before judge and jury represent an art entirely different from the objective analysis of evidence employed by a trained scholar. The lawyers for the most part espouse the "case" of the Earl of Oxford—one of the most unsuitable and unlikely of candidates—and then proceed by well-tried courtroom tactics first to cast doubt on Shakespeare's authorship and next to select bits and pieces of evidence which they think will build up the presumption that Oxford is the man. They confuse facts with hypotheses, and distort such evidence as they have by carefully selecting the information that seems to prove their contentions and by eliminating or disregarding information which is embarrassing to their thesis. It is not an impressive intellectual performance, but a few lawyers are having a marvelous time persuading themselves and a few of their less canny brethren. A distinguished Washington jurist recently shook his head sadly and commented: "Of course lawyers are not interested in evidence; they are trained to win cases tried before other lawyers who know the rules of courtroom procedure." Despite the good time that the lawyers are having, no one has disproved a mite of the evidence that Shakespeare of Stratford is the author of the plays that bear his name, or that anyone else wrote them. The Folger Library has no partisan concern to maintain the authorship of anyone. We simply do not have the time and patience to waste in arid sophistries and futile hypotheses. If anyone ever produced a single bit of genuine evidence to disprove Shakespeare's authorship or to establish another, every Elizabethan scholar in the land would assist in testing the evidence.

The identity of the saddened "distinguished Washington jurist" whom Dr. Wright directly quotes is an interesting subject of speculation. Perhaps Dr. Wright, if requested, might reveal it so that a confirmation, and possibly

elaboration, of the quote could be obtained.

W. BARTON LEACH
Story Professor of Law
Trustee, The Shakespeare-Oxford Society
Harvard University
Cambridge, Massachusetts

Elizabethan Drama at Gray's Inn

Malcolm Fooshee's article, "The English Inns of Court: Their Background and Beginnings," is intensely interesting. It would be even more so, had he amplified his statement, "In it [Gray's Inn] were held many of the masques and revels which were so popular in the Elizabethan era, and here on Holy Innocents Day, 1594, the *Comedy of Errors* was first produced."

In fact, one of the functions of Gray's Inn was the production of plays by the students. It was more than a school of law. It trained young gentlemen and nobles for their duties as courtiers. The admission of a student had to be approved by the sovereign. Some of the plays presented were Italian in English translation; a few were original. Among the students were the 17th Earl of Oxford, George Gascoigne, Francis Bacon, the 2d Earl of Essex, the 3d Earl of Southampton, and others who became notable.

CHARLTON OGBURN
New York, New York

Addenda to Article on Francis Bacon

Since you were kind enough to publish "Francis Bacon and the Knights of the Helmet" [April issue, page 402] correspondence has revealed two points which perhaps ought to be clarified:

1. The original Northumberland Manuscript is now at Alnwick Castle in Northumberland and not in the British Museum. The latter, however, has the excellent photo-facsimile edition by Frank J. Burgoyne of 1904.

2. The "Promus", in Bacon's handwriting, is still in the British Museum, and we have recently had it photographed.

3. The Elizabethan colored glass, in the possession of Lord Verulam was not always in the form of a screen, and I am sorry to have given this impres-

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sion. Lord Verulam has provided some interesting information from which it appears that, in the days of Francis Bacon, this glass was in one of the windows at Old Gorhambury, but was removed from the Tudor House about 1784.

The present Lord Verulam's grandfather caused the glass to be made into two screens by the Victoria and Albert Museum. There is no doubt, however, of the Baconian association with this colored glass and the scenes represented; and it is on view at Gorhambury in August every year.

I trust that this information may, perhaps, save visiting Americans time and trouble should they happen to be interested.

MARTIN PARES

The Francis Bacon Society
London, England

The Szold Article Helps a Future Lawyer

Mr. Oliver Reynolds, of New York, was kind enough to send me tearsheets of Robert Szold's fine piece on "The Practice of Law As A Career".

Some weeks ago, Mr. Reynolds and his son, David, also of the New York Bar, were kind enough to take my 16-year-old son to lunch for a discussion of his own feelings about choosing law as a career. The boy is in his last year in an Irish preparatory school in Dublin and hopes to go to college and law school here in America. Both Mr. Reynolds and David were full of wit and wisdom and opened up new insights for Richard, and I feel that the Szold piece will be a significant addition to the store of knowledge which he will need to make a choice. In addition to being an admirable piece of expository writing, the Szold article is the best summation I have read of just what a career in law entails.

I am sure that the law will always attract young men of real potential if they have the opportunity to meet wise and enthusiastic members of the profession, and to read material which combines so well idealism and practicality.

JOHN K. M. MCCAFFERY

New York, New York

The Profession of Law in England and America: Its Origins and Distinctions

Although they have a common origin, the legal professions of Britain and America have developed along separate lines in the years that have passed since the American Revolution. Judge Bastian discusses the historical reasons for the differences between the legal profession on the British Isles and the profession in the United States.

by Walter M. Bastian • ***Judge of the United States Court of Appeals for the District of Columbia Circuit***

IN THE NUMEROUS articles and treatises written in the past on the distinctions between the practice of the profession of law in England and in the United States, it has been customary to set forth the distinctions, with little or no reference to the underlying reasons, in more or less chronological order. Certainly I do not criticize that practice but I am convinced that, although generalizations may be indulged in, one must view the historical background giving rise to the distinctions in order to better understand and appreciate the activities of his brethren on either side of the Atlantic.

It may be said that the profession of law in England was born during the latter Norman period, eleventh to thirteenth centuries. During the earlier days of that era it was customary for a litigant to have assistance in the conduct of his case; however, the one offering assistance was neither an expert nor one tutored in the field of law, but rather a personal friend. The extent of this friend's duties was to recite the formal words necessary in making a claim or defense. The underlying reason for utilizing such assistance was that any fatal error made by the friend could be totally disavowed by the litigant, and thus he would not be prejudiced by it. Had he appeared personally in his own behalf and committed the error, he would have been without remedy.

By the late twelfth century, the common law and its procedural aspects had become so complicated that the untutored "friend" gave way, of necessity, to professional "narrators", the forerunner of the present-day barrister, who conducted the oral pleadings and argued the questions of law for his client. By the latter part of the thirteenth century, a second class of professionals, called attorneys, emerged in the field of law. This class perhaps owes its existence to the fact that many litigants, especially large landowners, found it extremely difficult to appear personally in court and assist throughout the case; hence the attorney made the necessary appearance on behalf of the client as his agent. This practitioner was the forerunner of the present-day solicitor.

The Inns of Court

From early times, the education of lawyers was in the hands of judges. Groups of students gathered in the houses of great lawyers and judges, under whom they studied. These "study groups" evolved into permanent societies, each maintaining its own premises, or "Inn", wherein the members lived a communal life. Four such Inns remain today, Lincoln's Inn, Inner Temple, Middle Temple and Gray's Inn. Upon the inception of the Inns, the control of legal education was passed voluntarily by the judges to these "Inns of Court". In many respects the structure of the Inns was similar to residential colleges of both England and the United States by offering, in addition to instruction in common law, tutoring in various other fields.

The Inns of the past, as they are today, were comprised of three distinct groups: (1) Benchers, the governing body of the Inn composed of senior members of the Bar, who conferred the degree of barrister-at-law upon its students by calling the individual to the Bar. Benchers were usually successful practitioners who became K.C.s or Q.C.s (King's Counsel or Queen's Counsel, according to the reign). Today, judges also are found within the group of benchers.[1] Further, certain of the benchers were members of the Joint Council of Legal Education and had authority to disbar and suspend its own members from practice. (2) Bar-

1. Prior to 1877, a barrister selected for the Bench was required to take the degree of serjeant at law, whereupon he left his own Inn and transferred to Serjeants' Inn. Today, however, judges become benchers in their original Inn.

risters, or outer barristers, the advanced students of the Inn. (3) Students, or inner barristers, the juniors or novices of the Inn. Prior to the eighteenth century, attorneys could be members of the Inns of Court, be called to the Bar, and could also plead their clients' cases in court; but, by the eighteenth century, attorneys were excluded from the Inns.

The distinction between the attorney who represented a person for purposes of litigation and the pleader who spoke for the person in court was, as we have seen, fundamental in early law. However, the reason for adherence to this distinction has changed over the years.

The barrister was called to the Bar by the benchers of the Inns of Court and was under relatively little control of the court. The attorney, however, was admitted directly by the judges of the court in which he sought to practice, and the courts controlled his examination before admission and the rules for conduct after admission. Being an officer of the court, the attorney was closely connected by the method of his appointment, his privileges and business, with members of the clerical staff of the courts. For admission as an attorney, the applicant was required to serve five years as a common solicitor, as a clerk to a judge, barrister, attorney or clerk of one of the courts of common law, this requirement evidencing that the attorney belonged primarily and essentially to the clerical side of the law. No clerkship or contact with the clerical staff of the court was required or expected of the barrister. He was not concerned with the mechanical phase of the law but rather with legal principles.[2]

The difference in the education of the attorney and that of the barrister further extended the breach between their ranks. Although both branches of the profession received training in the theory and the practice of law, the emphasis of the attorney's training during his apprenticeship was directed toward the construction and use of the common forms and processes of the legal machine, while the emphasis of the barrister's training was on mooting and discussion, reading and reporting from which he learned the substantive and adjective principles of law. From this we see that the attorney stressed the practical side of the law while the barrister the theoretical.

As written pleadings came into vogue, the distinction between the two classes became more acute. It was the attorney who personally elicited the facts from the client and prepared the pleadings from which the barrister argued the case at the Bar. As the association of attorney and client became closer, that of barrister and client drifted further apart. The attorney, rather than the lay client, tended to become the client of the barrister. Although some of the practices and customs for admission to either body have changed since the early days (barristers may now become solicitors under certain defined conditions), most of the distinctions have been maintained.

As the course pursued over the years by the profession in England inevitably resulted in the maintenance of a divided Bar, it was equally inevitable that the course in America should result in a fused Bar. Let us look briefly at the historical background of the profession in America.

The Profession in America

The American profession, as we know it today, was not born until the post-Revolutionary era. Among the early settlers in the New World there was a feeling of animosity toward the lawyer as he represented authority and class distinction. Numerous attempts were made to prohibit the practice of law altogether, but these attempts proved futile. At this time the fear of a rise of power within the ranks of the profession was baseless for no house was ever more divided. The lawyer, the technician, was practically an anomaly; the majority of the Bar were indifferently prepared and law practice was a part time avocation of laymen. No wonder that Charles Warren, in his *History of the American Bar*, described the colonial and Revolutionary period as an era of "law without lawyers". And John Adams, in speaking of the pre-Revolutionary period in New England, wrote: "Looking about me, in the country, I found the practice of law was grasped into the hands of deputy sheriffs, pettifoggers, and even constables, who filled all the writs upon bonds, promissory notes, and accounts, received the fees established for lawyers, and stirred up many unnecessary suits."

During this era, there was much part-time dabbling in the law by farmers, merchants, and the like, in the rural justice courts. Many of the better-read were on a par with members of the professional Bar in the art of advocacy. Many also obtained genuine prominence since the justices, usually laymen, were more inclined toward bold common sense arguments than toward rhetorical genius. Competition between the self-styled "lawyer" and the professional was quite keen, and understandably so, for with the exception of a small number of members of the Inns of Court who had migrated to the colonies (among whom were five signatories of the Declaration of Independence) and the few fortunate young men who ventured back across the sea to obtain a legal education in England and admission to the Bar in the Inns of Court, the education and training of the lawyer of that day was haphazard and often consisted of nothing more than private reading. The education of Alexander Hamilton, for example, consisted merely of reading law for four months. During the latter part of the eighteenth century, several universities offered courses in law but most were abandoned due to lack of interest. Confusion and chaos persisted in the profession until approximately the dawn of the nineteenth century.

With the advent of the new century, an era which may well be termed the most productive period in the American legal profession, interest in formal study of the law was renewed. Both government and the court systems were in their formative stages; the state and federal constitutions were as yet uninterpreted; a new society tempered by the recent revolution was born, with little or no tie to Old World tradition. The English and colonial law, believed to be unadaptable to this new society, was set aside and there was little substitution of new statutes or precedents. The lawyer then, at the threshold of

2. For an amplification of this study, the reader will undoubtedly find interesting and informative Robert Robson's recently published work THE ATTORNEY IN EIGHTEENTH-CENTURY ENGLAND (Cambridge Univ. Press, 1959).

his new era, when law in America knew neither precedent nor tradition, had to base his counseling and advocacy on his own reasoning rather than on research, for neither attorney nor judge could vindicate his position by prior decisions.

By the commencement of the Civil War, the pens of such men as Chief Justice Marshall, James Kent and Mr. Justice Story had established the intellectual independence of the legal profession in America, an institution worthy of the best traditions of the Old World and one which has persisted to the present day.

Educational Requirements Today

It will perhaps be interesting at this point to note the present-day distinctions between the educational requirements in England and those in the United States for admission to the practice of law.

In England a university degree is not a professional qualification. All that is necessary to qualify as a barrister at law is that the student "keep term" at an Inn of Court, which means that he shall dine at an Inn a certain number of times (a requirement no longer having any educational significance) and that he pass an examination offered by the Council of Legal Education. Many students prepare for these examinations by reading law at a university and by attending lectures and classes offered by the Inns of Court Law School, which is organized by the Council. Upon being called to the Bar, many new members become pupils of practicing barristers and read in chambers for perhaps six months to a year, for which they are required to pay the barrister from $275 to $450, depending upon the time spent. During this period it is unlikely that the pupil will earn any money himself.

The requirements for admission as a solicitor in England are quite different from those of the barrister. The basic requirement for the solicitor is that he serve a period of apprenticeship, called articles of clerkship. If he possesses a degree in law, science or arts, he serves with a practicing solicitor for a minimum of three years; or, if such a degree is lacking, he serves for five years. In the latter event, the aspirant must combine his articles of clerkship with study at an approved law school. During articles, the clerk may receive a small salary, no salary at all, or, in some instances, he may be required to pay a premium. Finally, for admission as a solicitor, the clerk must pass an examination more difficult than that required of the barrister.

Though the requirements for admission to the Bar in the United States differ slightly from state to state, it is usually required that the aspirant first obtain a specific number of college credits,[3] then a law school degree. Upon the completion of his law study, the student must pass a "bar examination". Each state offers its own examination, differing but slightly in the several states, and, as a prerequisite for taking the examination, a period of residency within the state is usually required. Upon successfully "passing the Bar", the student is admitted to the Bar of that state and, as a general rule, may immediately begin to practice before each of its courts as an attorney.

Space limitation precludes consideration here of all the distinctions remaining today between the branches of the profession in England but I believe it will be interesting to mention certain of the more prominent ones and to consider them in the light of American practice.

1. In England, barristers have exclusive right of audience in the superior courts, *i.e.*, the High Court, the Court of Appeal, the House of Lords, the Judicial Committee of the Privy Council, and most Quarter Sessions. In the county courts and the petty sessional courts (which entertain the bulk of civil and criminal cases) and in the administrative tribunals, the solicitor and the barrister share the right of audience. In general, barristers do not have the right of direct access to the client and are not permitted to act for the client except on receipt of instructions from a solicitor. Thus we see that the barrister is in effect a specialist in advocacy, and perhaps a particular field of law, while the solicitor is in the nature of a general practitioner.

These two divisions, barrister and solicitor, have no true counterpart in the United States. When one is admitted to the Bar of a state or the District of Columbia, he becomes, within that jurisdiction, a combination barrister-solicitor, with all the attendant privileges except that usually, before he may practice before the federal courts of the jurisdiction, he is required to have been a member of that Bar for a specific length of time.

2. Barristers, unlike solicitors, may not form partnerships, either among themselves or with solicitors. They may, however, share a suite of chambers, a clerk and a secretarial staff, each barrister carrying on his own individual practice.

In the United States, partnerships are permitted and, indeed, are very common, especially in our cities.

3. The barrister may not use business cards bearing the imprint "barrister at law", nor letterheads bearing that designation. He may not exhibit a shingle or sign proclaiming his profession nor may he solicit briefs from

Harris & Ewing

Walter M. Bastian was appointed to the Bench of the United States District Court for the District of Columbia in 1950 and was elevated to the Court of Appeals in 1954. He is a graduate of Georgetown University (LL.B. 1913) and practiced law in Washington from 1915 to 1950. He was Treasurer of the American Bar Association from 1945 to 1950.

3. There is an increasing trend in the United States today to require a college degree before a student may be admitted to a law school.

solicitors. In other words, he may do nothing, directly or indirectly, to advertise his profession.

The American lawyer, although not so severely limited, is prohibited from advertising his special field in the profession. He may exhibit a shingle and use simple business cards and letterheads bearing his name and "Attorney at Law" or a similar designation, but he may not, unless he be a proctor in admiralty or admitted to practice before the Patent Office, state thereon his field of specialty.[4]

4. A rule in England, unparalleled in America, is that a barrister must accept any work he is offered in the courts in which he holds himself out to practice, provided the fee is acceptable, and he must charge a separate fee for each piece of work performed.

The American lawyer may refuse a case on any ground he chooses, and he is in no wise bound to charge a separate fee for each piece of work performed. Many of our brethren represent clients on yearly retainers.

5. In general, a practicing barrister may not have any other profession or occupation. Such a restriction is unknown in America.

6. The solicitor, being an officer of the court like the American lawyer, owes a duty to both his client and the court. The barrister, however, since he has no contact with the client and is not technically an officer of the court, is responsible to no one.

7. The barrister may not sue for his honorarium nor may he be sued for negligence in his professional capacity, either by the actual client or by the solicitor retaining him.

The American lawyer may be sued for negligence or malpractice and may, within the limitations set forth in the Canons of Professional Ethics, sue his client for reasonable compensation, in order "to prevent an injustice, imposition or fraud".[5]

These are the major distinctions between the Bars of England and the United States today.

Although the division of the Bar in England now has no counterpart in America, this was not always true. The influence of the English colonists was strongly felt in the early stages of our development. In Virginia, an upper and a lower Bar was inaugurated and maintained until 1787. Pennsylvania maintained a lower local Bar, while Georgia had a higher appellate Bar. New Jersey maintained a distinction between attorney and counselor until 1959.

Formerly, clear distinctions were maintained in the United States, as in England, between (1) attorneys (those who signed pleadings in common law courts); (2) solicitors (those who dealt with bills in equity); (3) counselors (those who appeared for another in a court of law or equity); and (4) proctors (those who appeared in admiralty, ecclesiastical or probate courts). Interesting in this regard, is the fact that in 1790 the United States Supreme Court promulgated a rule that counselors could not practice as attorneys, and *vice versa*. However, in 1801 the Supreme Court ruled that counselors could be admitted to the Bar as attorneys; thus the often-used designation "attorney and counselor at law" was born.

The Advantages of the English System

It has been said that the system of the separate Bars of England is superior to that of the integrated Bar of the United States. Prominent among the arguments in support of this school of thought are: First, that due to the lack of a contract between barrister and client, and his relative isolation from the client, the barrister can view the facts of a given case expertly and dispassionately, and thus discourage unfounded suits; second, that due to the prohibition of partnership between barrister and solicitor, the solicitor is in a position to choose the most effective and suitable barrister for the particular case, thus giving better service to his client; third, that the distinction provides a specialized class of experts in trial and appellate advocacy and in the various substantive areas of the law, including the judges as they are selected from the leading barristers, thus resulting in a highly expert Bar and Bench better equipped to enforce the law generally; and fourth, that due to the close control which is maintained by the two branches of the profession over its members, a more effective organization can be maintained.

It would be difficult to support the position that the foregoing arguments are without merit. If time would permit, however, I am certain that an equal number of attributes characteristic of the fused American Bar could be cited. Be that as it may, the more one considers the distinctions between the English and the American professions, the more one comes to the realization that our differences are but procedural and superficial.

We in America owe an enormous debt to our friends across the sea for they, with but an abundance of ingenuity and genius, and with little aid from Roman law, forged the original theory and system of the common law which we both so proudly share. The members of the legal profession of England may justly be proud of their state for they are the inheritors of a truly great tradition. Though our practices be dissimilar and our professions differently constituted, we are nevertheless of one fold and one purpose. As Charles B. Andrews so eloquently phrased it:

> Justice is the soft but enduring band which holds men together in organized society. It is the greatest interest of men on earth, and whoever ministers at her altar or contributes anything to make the foundations of her temple more firm or to raise its dome nearer to the skies, joins his name and fame to that which must be as enduring as the frame of human society [48 Conn. 596].

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4. For a critique of Canon 27, which limits the use of specialization designations, see 70 HARVARD LAW REVIEW 1121, *et seq.*

5. Canon 14.

The Trial of a Lawsuit in the United States

In this article, an experienced defense lawyer explains how a suit for personal damages is conducted in the United States. Although the material is intended primarily to point up the differences between English and American practice, Mr. Hawkins works in many hints on courtroom strategy and trial technique.

by Kenneth B. Hawkins • *of the Illinois Bar (Chicago)*

FROM EARLIEST colonial days the English common law has been the cornerstone of our laws in the United States. Most of the substance remains, but a few decades ago our federal courts, followed by many state courts, departed from the common law system of pleading and adopted some rather radical new rules of practice and procedure. In view of these changes, our English visitors may now be interested in our present-day method of trying lawsuits.

The legal problems confronting the United States, with 179,000,000 heterogeneous people living in fifty states covering 3,615,000 square miles, naturally differ materially from the problems confronting England with its 42,000,000 homogeneous people living under the same laws in a comparatively small area.

The different historical backgrounds of our states have caused the laws of each state to vary considerably. New England, Illinois and the Central West have closely followed the English common law, but in the Far West and South, Spanish and French law have definitely affected the common law, and in many respects the codes of New York and other states have completely changed both the substance and procedure. Superimposed on the local state laws are federal laws which apply to all states.

These differences often make it difficult for our lawyers to practice outside their own states. The writer is most familiar with the laws of Illinois and he has, therefore, confined this article to damage suits in the federal and Illinois state courts. It is based on knowledge gained from having tried more than six hundred jury cases over a period of nearly fifty years.

The outline of the federal and Illinois judicial systems, with comments (appearing on page 822), may help the reader to understand better the functions and jurisdictions of these courts.

The Composition of the Supreme Court

The Supreme Court of the United States is the head of our judicial system. It consists of a Chief Justice and eight associates appointed for life. The selection of these and other federal judges is granted by the Constitution to the President of the United States, by and with the advice and consent of the Senate. The Presidents usually, but not always, appoint members of their political party. With a few notable exceptions the appointments have been good. Political obligations have occasionally resulted in questionable appointments.

The American Bar Association, its Standing Committee on the Federal Judiciary, and recently the Department of Justice, have been active in recommending, approving or opposing proposed appointments to all federal courts. The Senate has wisely shown a tendency to give greater consideration to their suggestions. Unfortunately in this country we do not have any associations of lawyers trained and disciplined as they are in the English Inns of Court, from which to draw our judges.

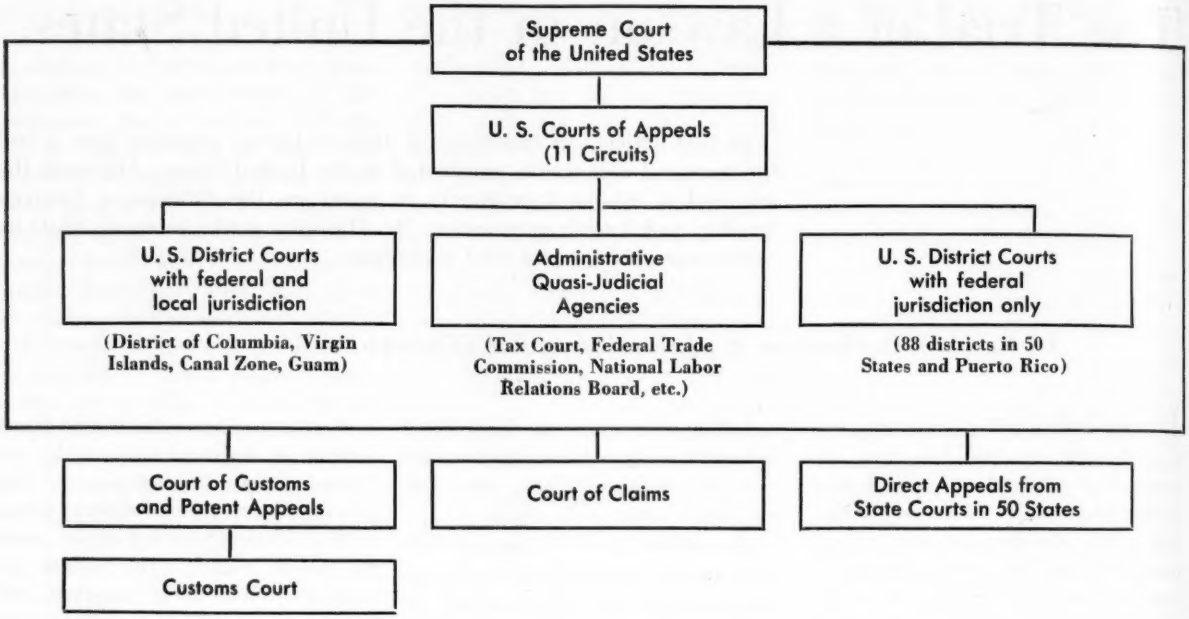
Next in order are the United States Courts of Appeals, followed by the United States District Courts. The District Courts are the federal courts with which the practicing lawyer comes in closest contact. The judges try criminal, civil, jury, non-jury, admiralty, patent, bankruptcy and anti-trust cases. District Judges, therefore, should be skilled trial lawyers so that they may hold their own with the capable and specialized attorneys who appear before them in so many diversified branches of the law.

At the head of the Illinois courts is the Supreme Court with seven judges, one from each judicial district, elected for a term of nine years. Below the Supreme Court are four Appellate Courts whose judges are appointed by the Supreme Court from the circuit courts for terms of three years each.

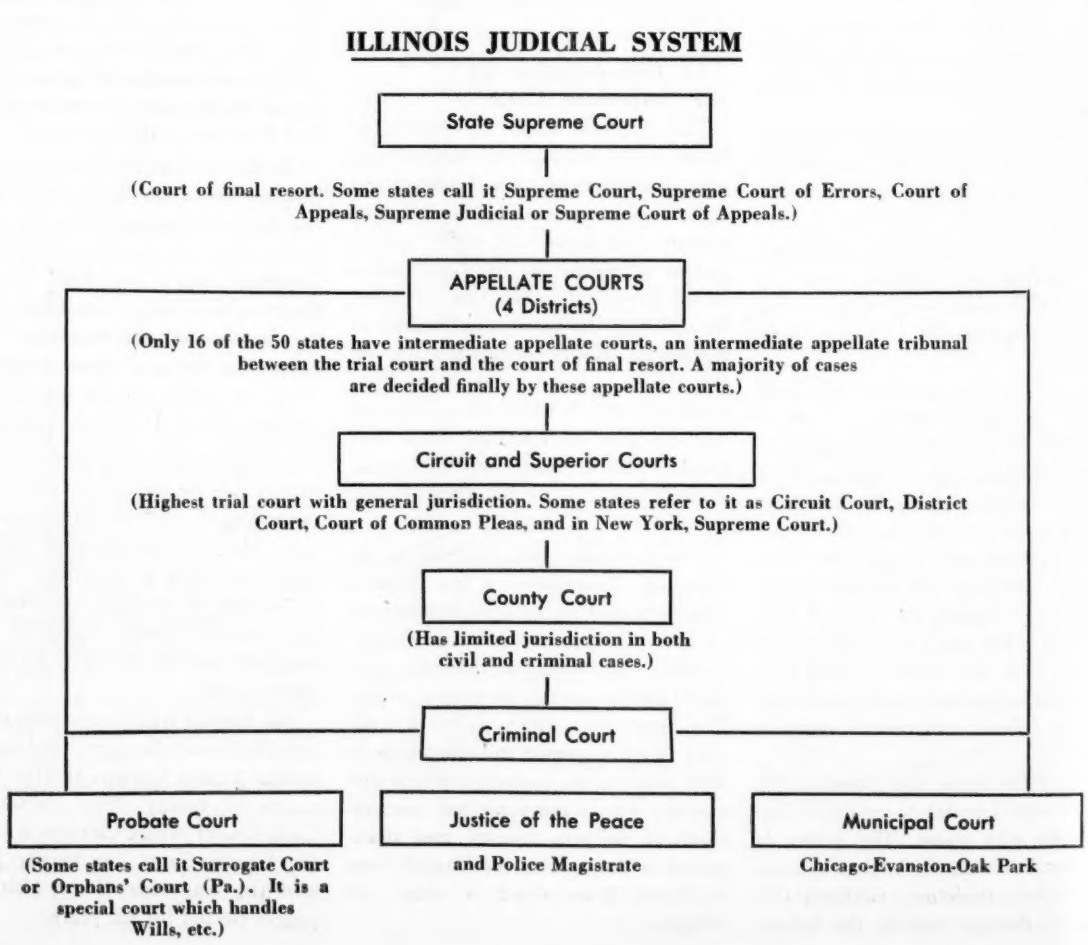
The Appellate Courts, as the name implies, exercise appellate jurisdiction from the judgments, orders or decrees of any circuit, superior, county, state or municipal court except that criminal cases above a misdemeanor and civil cases involving a franchise, freehold or validity of a statute go directly to the Supreme Court. Appellate Court decisions may be reviewed by the Supreme Court.

The highest trial courts with general jurisdiction are the circuit and superior courts of Cook County, and the circuit courts of twenty other circuits. In Cook County, where Chicago is located, the Circuit Court has twenty judges and the Superior Court thirty-six judges elected for six years.

FEDERAL JUDICIAL SYSTEM



ILLINOIS JUDICIAL SYSTEM



Our system seems complicated, but a trial lawyer soon becomes familiar with it. Should he have occasion to litigate in a jurisdiction not his own, he generally employs local counsel to assist. This also tends to offset the prejudice which may exist locally against outside counsel.

Crowded Dockets— A Continuing Problem

Notwithstanding the number of courts and judges, the judges in metropolitan areas are unable to keep abreast of the cases filed. The reasons for this are many. The 60,000,000 automobiles in this country are responsible for a tremendous number of lawsuits. In 1959 there were 37,600 deaths and 2,870,000 injuries from automobiles. The rapid growth in population with no adequate increase in the number of judges is the greatest reason for the congestion. The shortening of the work week and the ever-increasing indolence of many clients, lawyers and judges are also contributing factors. Remedies have been suggested but little headway has been made in correcting the condition. The situation is of serious concern to the public as well as the legal profession and unless corrected, may eventually destroy our right to trial by jury, the bulwark of liberty and freedom among all English-speaking peoples.

On March 1, 1960, there were 60,659 civil cases pending in the Circuit and Superior Courts of Cook County, with fewer than fifty judges to try them! The average delay is six years, an inconceivable situation in England. Of the cases awaiting trial, 80 per cent are for personal injuries or property damage.

Damage suits in this country are tried by a comparatively few highly specialized lawyers who are divided broadly into lawyers for plaintiffs and lawyers for defendants. Out of approximately 8,000 attorneys in Chicago, fewer than 500 are really experienced in the trial of personal injury cases. The others are counselors somewhat analogous to English solicitors.

British barristers may be surprised to learn that cases for the plaintiff in the United States are generally handled on a contingent fee basis, a practice unheard of in England, and which should be more strictly supervised here. The fee is usually 25 per cent of the amount received in settlement before trial and 33⅓ per cent of the amount recovered by judgment or settlement after trial begins. Plaintiff's expenses are paid from plaintiff's share.

Settlements and Judgments Are Frequently Tremendous

The tendency of juries to favor injured persons, the prevalent socialistic theory of distributing wealth, and the belief that insurance companies and other corporate defendants have unlimited funds, plus the present inflation, have caused settlements and judgments for unbelievable amounts. The yearly earnings of many plaintiff personal injury lawyers, based on such contingent fee contracts, run well into six figures and the highest income brackets.

Defendant lawyers are paid on a *per diem* or fixed salary basis. All costs are paid by defendant. Although the earnings of many successful defendant lawyers are substantial, they are far below those of successful plaintiff lawyers. The lower compensation is offset somewhat by the fact that a defendant lawyer is paid whether he wins or loses, whereas the plaintiff lawyer must win to be paid. This unhealthy condition frequently leads to sharp practice. Also the defendant lawyer is free of the stigma often attached to a plaintiff lawyer because of his direct, unethical solicitation of cases.

As every English lawyer knows, the system in England is quite different from the method followed in the United States. In England an injured person first consults a solicitor, the counterpart of an American office lawyer. The solicitor, after discussing the facts, decides whether or not there is a legitimate claim under the law. If there is, a fee is agreed upon and the solicitor or his clerks then prepare the case for trial. They interview witnesses, abstract the decisions, determine the pleadings, and prepare a detailed "brief" or dossier of the material to be used.

The solicitor then submits the "brief" to the barrister he thinks best suited to try the case. The "brief" specifies the fee.

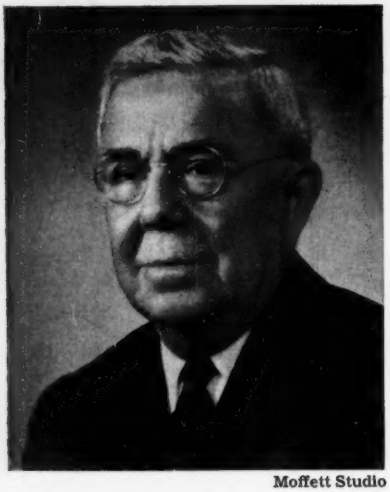
In the United States an injured person is generally called upon immediately by several individuals, each representing a plaintiff's personal injury lawyer. One of the individuals usually persuades the injured person to sign a contingent fee contract to employ the lawyer he represents. The solicitation is more likely to succeed with persons of little or no legal experience. If the runner, or "ambulance chaser", as he is called, represents one of the better personal injury lawyers, a good service is rendered, but if the reverse is true, a great disservice is done the unfortunate victim.

The Plaintiff's Lawyer Prepares His Case

A conscientious plaintiff lawyer prepares his case with care. His services correspond to the services of the British solicitor and barrister combined. He interviews witnesses, takes their statements, has his client examined by reputable physicians, and has X-rays, photographs and plats made. If necessary, he serves interrogatories and takes adversary depositions of the defendant and of others. He also serves notice on the opposite side to admit facts and to permit an examination of any relevant documents. This is all done under the new rules.

Unlike the plaintiff lawyer, a defendant lawyer does not seek the job; the job seeks him. If defendant is covered by insurance, he reports the accident to the company. The claim department investigates the facts and prepares a file similar to an English solicitor's "brief" except it does not brief the law. The company then refers the file to an independent trial lawyer best suited to handle the case. If the defendant is not insured he retains his own lawyer, and if he is not an experienced trial lawyer he procures one.

The lawyer reviews the file and renders an opinion to the client with suggestions for additional investigation, if necessary. He prepares the defendant's pleadings, arranges for medical examinations, depositions and interrogatories. The client reimburses the lawyer



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Kenneth B. Hawkins is a senior partner in a Chicago law firm. Born in Burlington, Iowa, he received his A.B. degree from Harvard College in 1908 and his LL.B. from Harvard Law School in 1910. He was admitted to the Iowa Bar in 1910 and to the Illinois Bar in 1911.

for his expenses, plus a retainer for handling the case to the time of trial, after which he usually pays the lawyer on a basis of one to three hundred dollars a day.

Pretrial Conferences—Sometimes Useful, Sometimes Not

Under present federal and Illinois practice, a case is called for a pretrial conference about a year prior to trial. All lawyers who are to try the case and are familiar with the facts are expected to attend the conference. They should be prepared to discuss the issues, the facts to be admitted or contested, and should have authority to pass upon a settlement fair to both sides. Many, but by no means all, of our pretrial conferences are so conducted. If properly conducted, pretrial conferences are of great value and result in settlements which shorten the long list of cases awaiting trial. A pretrial conference conducted by assistants or clerks without authority and unfamiliar with the case is a waste of time and an affront to the judge and opposing counsel.

The actual trial of a case in the United States in many respects is not unlike a trial in England. When the attorneys have answered ready, the clerk calls a panel of twenty or more jurors. The first twelve take their seats in the jury box and are sworn to answer questions touching their qualifications.

The alert lawyer watches the jurors carefully. He may learn much from the way they answer to their names, walk to their seats, the way they dress and from their general appearance. He also studies the remaining jurors to see the kind of juror he may get should any of the twelve be excused.

The judge then makes a short talk to the jury and asks a few questions regarding their qualifications, after which he turns them over to counsel for examination. Each lawyer makes a short opening statement, explaining his view of the case. The plaintiff's attorney, followed by the defendant's attorney, then examines the jury in panels of four until twelve are agreed upon. Each side has three peremptory challenges and an unlimited number of challenges for cause.

The Problem of Selecting a Jury

A carefully selected jury is of great importance. To examine a jury well one should know human nature and be a master of psychology. American lawyers attribute greater importance to the selection of juries than the English. In criminal or serious damage suits it may take us from several days to several weeks to select a satisfactory jury. A Chicago lawyer once asked a London barrister at what point he considered that the trial of an English lawsuit began, "After the jury is selected", said the barrister. "Hell," replied the American, "it's all over with us by then." This is often too true.

The attorney for the Crown in the trial of the twelve Sinn Feiners for insurrection several years ago is reported to have selected the jury in less than half an hour. This could never occur in the United States. An English jury is composed of men of the same nationality who have lived under one system of law all their lives. They see and think alike. In the United States the average jury consists of men and women of different races and walks of life from all over the world. Some may have been naturalized only recently. It, therefore, takes time and many questions to procure an impartial, qualified and reasonably intelligent jury.

An experienced lawyer selects the jury himself. He never lets an assistant do this. It is an insult to the jury. Jurymen take their duties seriously, and they expect lawyers to do likewise.

The Average Juror Likes Sincerity, Earnestness

American lawyers wear neither wigs nor gowns, but the successful lawyer dresses neatly and modestly. He is courteous to his opponent, the jury and the court, but never fawns. Our average juror may not be highly educated, but he is not stupid. He dislikes sham and appreciates sincerity and earnestness. Occasionally a joke will break monotony, but it must be appropriate. A flat joke can be disastrous.

Most trial lawyers think that Swedish jurors are stubborn and clannish and that Irish and Negro jurors are generous with a defendant's money. American lawyers consider women jurors critical of their own sex and more emotional than men. Women are better able to stand pain, and consequently women jurors question a plaintiff's exaggerations. Women jurors pay closer attention to the evidence, often take their responsibilities more seriously than men and have admittedly raised the decorum of our courtrooms.

In examining jurors the wise lawyer uses simple words. He never talks down to the jury. The experienced lawyer will take the sting out of damaging testimony by admitting it early in the trial. This enables the lawyer to impress the jury with his fairness and honesty. To give that impression is one of the fine arts of a successful trial lawyer.

A skilled examiner calls the jurors by name. This is not trickery but good tactics. He may also refer to the juror's business or mention other matters which have been brought out on *voir dire*. This pleases the juror who feels that the lawyer, by remembering

the questions previously put, considers him a desirable juror.

Defendant lawyers explain that the commencement of a suit does not entitle plaintiff to recover, that the burden of proof is on the plaintiff to prove his charges; it is not on the defendant. If properly examined, jurors will readily admit they have no prejudice against a defendant. Should the suit be against a railroad, instead of asking the juror, "Have you ever ridden on a railroad?" the experienced questioner says: "Mr. Jones, I assume you have ridden on a railroad many times, have always been treated fairly and that you have no prejudice against railroads simply because they are large corporations." In this way he makes the juror feel he is a pretty important fellow who travels a lot. But if he puts the question bluntly, "Have you ever ridden on a railroad?" the juror feels insulted and takes offense at such a stupid question because today everyone has ridden on a railroad. In a similar way he tells the juror that he assumes the juror owns stock in corporations and has no feeling against corporations. He thereby flatters the juror by assuming he is successful enough to own stock. This often destroys the bugaboo attached to the word "corporation".

In most state and federal courts the judge instructs the jury after the final arguments. The skillful lawyer on *voir dire*, therefore, exacts a promise from each juror that he will follow the instructions even though he may disagree with them. By his questions he tells them they should not be influenced by any outside matter and should not make up their minds or discuss the case with their fellow jurors until all the evidence is in, and they have heard the arguments of counsel, been instructed by the court, and have finally retired to the jury room to consider their verdict. Then it is their duty to discuss fully with each other all the admitted evidence and to disregard all the evidence which has been stricken.

The Opening Statement—Some Considerations

After the jurors have been accepted, the clerk swears them to try the issues. Plaintiff's attorney then makes an opening statement, followed by defendant's statement. The opening statements are made in simple words, readily understood by the jury. The well-prepared lawyer never states as a fact anything he has reason to believe will not be substantiated by the evidence. Each lawyer naturally tries to present his side of the case in as favorable a light as possible. The lawyer who presents the soundest theory and produces evidence to support it is the one who wins.

American lawyers follow no fixed formula in their opening statements. Lawyers for plaintiffs ordinarily favor a rather long statement with emphasis on the injuries rather than liability. Danger lies in stating too much, particularly things which they later fail to prove or cannot prove.

Lawyers for defendants are inclined to favor short opening statements. If the injuries are patent, the smart lawyer admits them, even describes them rather fully unless they are such as would appeal too strongly to sympathy. Where to stop is a question of judgment.

After the opening statements are concluded, defendant's counsel moves to have the witnesses, other than the plaintiff and defendant, excluded from the courtroom. Excluding witnesses prevents an overenthusiastic witness from prevaricating and adding weight to false testimony heard from a preceding witness.

The Physical Arrangement of the American Court

Our visiting barristers may be interested in the differences between our average courtroom for the trial of cases and the English courtroom. An Illinois courtroom is usually 40 to 60 feet long, 30 to 40 feet wide, and 15 to 20 feet high. At one end is the judge's desk or bench, four or five feet above the level of the floor. This enables the judge to look down on the lawyers, the witnesses and the jury. It is said to give him a psychological advantage. The bench is surrounded on three sides by a wooden parapet. Behind the judge's bench there is usually an American flag and frequently photographs of famous jurists.

At the side of the judge's bench but outside the parapet is the clerk's desk and on the other side is the witness chair, often called the witness stand. In this country the witness chair is usually much lower than in England and the witness does not stand but sits and faces in the same direction the judge faces.

A few feet to the side of the witness stand is the jury box extending along the side wall. This is at floor level, contains twelve easy chairs so that the jury may be comfortable, but which unfortunately often induce inattention and sometimes sleep. The jury box is separated by a wooden fence or railing, approximately three feet high. The bailiff, who has charge of the jury, sits at the far end of the jury box outside the railing.

Directly in front of the witness stand are desks for court reporters who take shorthand notes of everything said during the trial. About ten feet in front of the judge's bench is a table for use of counsel and their clients, and ten feet beyond the table are benches for spectators separated from the lawyers by a railing. Federal courtrooms are larger and more elaborate but arranged in substantially the same way. The courtrooms of our reviewing courts naturally differ in many respects.

After the witnesses have left the courtroom, counsel for plaintiff stands, addresses the court, the jury and opposing counsel, and then calls his first witness to the chair. The witness stands while the clerk administers the oath. Usually he is not required to place his hand on the Bible.

In examining a witness the attorney may sit at the table or stand in any convenient place. Often he stands at the far end of the jury box. In this position he hears what the witness says and so knows the jury has also heard. The experienced lawyer realizes that this position requires the witness to face the jury and talk directly to them, which is what every good lawyer seeks to have the witness do.

The Plaintiff—The Most Important Witness

The order of presenting witnesses and introducing evidence varies, of course, with each case and each law-

yer. Usually a plaintiff's lawyer puts on a few perfunctory witnesses to identify maps, plats, photographs and conditions surrounding the scene before and after the accident. A few good occurrence witnesses are then called. Less important witnesses follow and after the jury has a clear picture of the accident and surrounding conditions, the plaintiff takes the stand and describes both the accident and his injuries in great detail. He is the most important witness. The impression a plaintiff makes may determine whether he wins or loses his case.

The attending physician and generally an expert on plaintiff's particular disabilities are next called. The expert has examined the plaintiff at the lawyer's request solely for the purpose of describing plaintiff's injuries without minimization and to answer hypothetical questions. He is usually very familiar with court practice. These hypothetical questions and the answers thereto, rehearsed in advance, are often a help to plaintiff and a curse to defendant.

The hypothetical question must cover all important relevant testimony admitted in evidence. It amounts, therefore, to a general review and repeats for the benefit of the jury the testimony that has been given on behalf of the plaintiff. The expert's answers must be based exclusively on the hypotheses. The opposing lawyer regularly objects to the questions and answers on the ground they contain a presumption based upon a presumption, do not include all the necessary elements, misstate certain elements and invade the province of the jury. If the hypothetical question is put to the attending family physician or one not accustomed to testify in court, he may innocently admit on cross examination that his opinion is based partly upon what he found in his personal examination. This is fatal and the judge will then strike the answer upon the cross examiner's motion. A lawyer may also succeed in striking the question if the closing part calls for a conclusion rather than an opinion based on reasonable medical certainty. By objections and motions the damaging effects of the hypothetical question may be greatly lessened.

It takes a lawyer well prepared on the facts who possesses considerable medical knowledge to cross examine a medical expert successfully. A poor examination only emphasizes the bad effects of the questions and answers. Following the cross examination, plaintiff's attorney calls a few good witnesses so as to end his case on a high note. A well-prepared lawyer always saves one or two of his best witnesses for the last.

The foregoing is the way a plaintiff's lawyer generally conducts his case. Every lawyer, however, has his own ideas and often changes his ideas during the trial, the same as a coach may change his batting order in a ball game or cricket match.

Coaching Witnesses— An Accepted Practice

A common law suit is and always should be an adversary proceeding in which each side tries to win. Consistent with fair play, each lawyer paints his side of the picture in the brightest possible colors. To do this, the well prepared lawyer has the witnesses come to his office before trial, and, unlike the English barrister, he personally goes over the facts with each witness. He questions them in much the same way he will examine them in court. He familiarizes them with the plats and photographs he intends to use and refreshes their memories, if necessary, by their signed statements. He instructs them how to act on the stand, tells them to look squarely at the jury, to keep their hands away from their mouths, not to chew gum, not to fidget in their seats, to make sure they understand the questions before answering, and, if not, to have the questions repeated. He advises them, so far as possible, on what may be asked on cross examination, and warns them against losing their tempers or trying to outsmart the cross examiner. He tells them not to answer if there is an objection, not to testify like a parrot from a memorized piece or to try to tell everything at once but to answer each question separately, concisely and clearly. The reputable lawyer insists the witnesses be absolutely truthful and assures them no honest witness will be discredited, but a dishonest one can be torn apart by the cross examiner.

To a layman, and to an English barrister, it may not seem proper for a lawyer to go over the facts so carefully with his witnesses in advance of trial. In the opinion of our most esteemed lawyers and judges, such a notion is totally wrong. Not to do so often results in a tremendous waste of the court's time with witnesses who know little or nothing about the case. Needless to say, in going over the facts as outlined above, no self-respecting lawyer ever tells the witnesses what to say. Most witnesses have never been in a courtroom. They are excited and frequently terrified at the thought of testifying. The lawyer's job is simply to guide the witness by asking easily understood questions at the beginning and gradually to make him feel at ease on the stand so he will not become confused and misstate things in his strange surroundings. To do this successfully requires long experience accompanied by many disappointments.

As each lay witness finishes he is cross examined just as the expert is cross examined. A good cross examination is valuable, but a poor one has destroyed many a good case. If a cross examiner can impeach a witness, he is on safe ground and may crucify him, but if he doubts he can discredit him, he should not examine. Many good lawyers waive cross examination and prefer to rely on their own witnesses to win the case.

Cross examination dates back to the sixteenth century. It was designed for the purpose of disclosing a witness' interests or prejudices as well as his knowledge or lack of knowledge of the facts and, above all, to find out whether or not he had testified truthfully. In England the cross examiner is still allowed to cover a wide field but our courts are inclined to limit the cross examination closely to matters testified to on direct examination.

The Element of Surprise— It Helps Establish the Truth

The excellent results formerly obtained from skillful cross examinations have now been almost destroyed by our new Rules of Civil Practice and Procedure. These rules have taken away the

element of surprise, a *sine qua non* if the truth is to be brought out. Surprise will never disturb a truthful witness; his testimony will always be the same. But an untruthful witness needs a remarkable memory always to testify the same way. There is no reason to protect a dishonest witness. The object of every lawsuit is to seek the truth.

These new rules were based on an erroneous English ruling which, unbeknown to the American authorities, had previously been repealed. The Queen's Case (2 B & B 286; 129 Eng. Rep. 976), which held that before a witness could be cross examined on the contents of a signed document he must first be permitted to read it, is the ruling referred to. The decision raised a tremendous furor. In *Wigmore on Evidence* (3d Ed., par. 1259) the author pulls no punches when he says:

> The English decision, laid down a rule which for unsoundness of principle, impropriety of policy, and practical inconvenience in trials, committed the most notable mistake that can be found among the rulings upon the present subject.

An adroit cross examiner necessarily handles the young, the old, the loquacious, the timid or belligerent witnesses differently. Each presents a problem which he understands. The skilled examiner keeps his temper, is always courteous and thereby frequently wheedles a witness away from his sponsor. Sometimes, however, he and the witness get into a wrangle which our judges should, but often do not, check. English judges are more strict and conduct their trials with greater austerity. State court judges, as a rule, are more lenient than our federal judges. This seems to indicate that appointed judges are better disciplinarians than elected judges. Above all else, a good cross examiner never asks useless questions which often end in disaster. He knows when and where to stop. Like French novels, he leaves a few things to the imagination.

After plaintiff rests his case, defendant's attorney moves for a directed verdict. If the court grants the motion the trial is ended. If denied, defendant produces his evidence in a way similar to that of the plaintiff, except he usually starts with one of his best witnesses so as to strike hard and alert the jury to the fact there are two sides to a lawsuit.

To offset plaintiff's medical testimony, including answers to hypothetical questions, the well-prepared defense lawyer puts on one or more expert physicians who have examined the plaintiff. Most states now require a plaintiff to submit to a medical examination by a doctor selected by defendant. Good medical testimony produced by a defendant may not affect liability, but frequently it will reduce damages to a minimum. Motion pictures of the plaintiff taken surreptitiously will often show him doing things he testified he could not do. These may be received in evidence and shown to the jury. There is no better way to destroy an adversary's case. The defense lawyer, like the plaintiff's lawyer, saves a few good witnesses for the end so as to close his case with a good impression which will remain fixed with the jury.

After the defendant has finished, plaintiff may offer evidence in rebuttal to disprove the defense, but he cannot repeat what he has already produced in evidence. Cumulative evidence is not permissible. Rebuttal evidence is usually short and frequently waived.

Instructions to the Jury

When both sides have rested, defendant again presents and, if warranted, argues vigorously, a motion for a directed verdict. If this is denied, counsel adjourn to the judge's chambers to discuss the written instructions they have previously submitted. Objections to the instructions must be specific, otherwise the reviewing court will not consider the objections.

After the instructions are settled counsel argue the case. The court limits the time depending on the character of the trial. Plaintiff's attorney divides his allotted time into an opening and closing argument. Defendant's counsel cannot divide his time. Arguments are still important in the trial of lawsuits in this country. The old flag-waving oratory is no longer followed in metropolitan areas, but is still in vogue in rural communities.

Reaction of Jurors Influences Argument

Each lawyer has his own notion about the kind of argument to make. He varies it depending on the nature of the case and the caliber of the jury. An effective advocate keeps in mind from the time he selects the jury what he may say in his final argument. Throughout the trial he continually watches the jurors and notes their reactions to the witnesses, the evidence and the conduct of counsel. From these reactions he subconsciously outlines his argument.

Personal injury lawyers for the plaintiffs devote the greater part of their argument to their client's injuries. They picture vividly the pain and suffering the client has had and will continue to have, the expenses incurred and to be incurred, his lost earnings and inability to earn in the future. The more successful lawyers do not rant or rave but explain the damages in a calm, dispassionate way. They assure the jury they are not asking for sympathy but only for such sum as the client is justly entitled to under the law.

In recent years many plaintiff lawyers in order to gain what they call "the more adequate verdict" produce demonstrative evidence during the trial partly for use in final argument. To justify the enormous sums for which the suit is brought the lawyer may write on a blackboard set up in front of the jury the amount spent and to be spent for medical expense, to which he adds the wages lost and to be lost, the life expectancy of the plaintiff, which he reduces to days and then multiplies by a figure which he arbitrarily suggests as five or ten dollars a day for pain and suffering. Although the total of these figures is astronomical, he, nevertheless, tells the jury it is less than the amount for which the suit was brought. Many of our judges do not admit such evidence or permit such argument. It would not be tolerated in England. However, other judges feel the practice is proper and overrule defendant's repeated objections.

The Defense Addresses the Jury

When plaintiff's counsel finishes, defendant's counsel addresses the jury. The experienced advocate knows that by standing quietly in front of the jury and looking intently at each and every juror he will gain their undivided attention, which he must have, and will arouse their curiosity as to what he can possibly say in reply to plaintiff's touching appeal.

Defendant's reply will depend on what opposing counsel has said but he usually begins by reminding the jury of their oaths made at the beginning of the trial; that they would not make up their minds until they had heard his argument and the instructions of the court; that they would not let sympathy play any part in their verdict; and would require plaintiff to prove his case by the greater weight of the evidence. He informs them in simple language that there are only two questions involved, liability and damages; that to establish liability plaintiff must prove not only negligence or fault on defendant's part but due care on plaintiff's part, and if plaintiff has failed to prove either by the greater weight of the evidence, the jury need consider nothing more and should return a verdict of not guilty.

He then summarizes the more important testimony each witness has given, and tells the jury if he has misquoted any testimony they should disregard it, but if what he has said is true they should follow it. He points out any inconsistencies in the plaintiff's evidence and shows wherein the plaintiff has failed to prove his case as the law requires. A good advocate refers specifically to certain applicable instructions he knows the court will give. This is effective because the jurors will feel the lawyer is sincere when later they hear the same thing in the judge's instructions.

After the defendant's lawyer has thoroughly argued the question of nonliability, he tells the jury that because his opponent has discussed damages at such length, he will reply, but because he discusses damages or because the court gives any instructions on damages does not mean that either he or the court thinks damages should be awarded.

He then repeats what the defendant doctors have actually found on their examinations, which is not something based on hypothetical questions. If a blackboard has been used, he shows how exaggerated some of the figures are by pointing out they are not based on evidence but on unfounded suggestions of plaintiff's counsel and should therefore be entirely disregarded.

In closing, defendant's lawyer reminds the jury he will have no further chance to reply, that plaintiff's attorney will no doubt discuss injuries at great length so as to smoke screen the liability question. He asks them to study and follow the instructions, and to return a verdict which under the law and evidence he submits can only be not guilty. He then thanks the jury sincerely and slowly takes his seat.

In reply, plaintiff's attorney denies he is asking for sympathy and insists all he wants is justice. If he is too eloquent or goes beyond the limits of a proper reply, defendant's counsel objects. This disconcerts the speaker and generally results in shortening the reply.

At the close of the arguments the court reads the instructions to the jury. Many of our judges do this hurriedly and very badly. Others do a splendid job. After the jury retires to the jury room with the instructions and exhibits, counsel agree with the court on the time to be allowed the jury to reach a verdict and for the return of a sealed verdict to be read the next morning, if necessary.

Counsel then thank the court, gather up their files, light their cigarettes, shake hands, and, friends again, leave the courtroom eager for the next case, hoping that justice has been done.

The Conduct of an American Appeal

The differences between taking an appeal in the United States and taking an appeal in Britain, Mr. Wiener declares, are the result of the differences in court systems and organization of the legal profession. English lawyers will be struck by the importance of the written brief in American appellate courts and the American practice of limiting time for the oral argument.

by Frederick Bernays Wiener • ***of the District of Columbia Bar***

IN THE UNITED STATES there is a unified legal profession and a dual system of courts. England, on the other hand, has a divided legal profession but a unified system of courts. Those two fundamental differences necessarily condition appeals in this country quite as much as they affect other aspects of American law practice. But, as will be seen, perhaps the most basic difference between an appeal in the United States and one in England is that in America the contending appellate advocates are always required to file written—generally printed—arguments with the appellate court, while their oral arguments are sharply curtailed by rigid time limits.

Our own dual complement of courts—a federal judicial system and a separate judicial system in each of now fifty states—makes generalizations in respect of appeals somewhat difficult. Nonetheless, a general survey that sets forth respectively the progress of a federal appeal and of an appeal in most states can be ventured with some confidence, though delineation of local details and differences must necessarily be omitted.

The Basic Appellate Structure

In the federal system, the United States District Court is the court of general and original jurisdiction. There is at least one such court in every state, and there are up to four in others. Except for a relatively limited number of cases, in which by reason of their public importance an appeal can be taken directly to the United States Supreme Court,[1] appeal from a final judgment of the United States District Court lies to the United States Court of Appeals in one of eleven Circuits as of right.[2] Certain classes of interlocutory judgments may also be appealed, some as of right, some by permission.[3]

The Courts of Appeals also review the orders of numerous administrative and regulatory bodies such as the Tax Court, the National Labor Relations Board, and most other federal regulatory commissions.[4]

Most judgments of United States Courts of Appeals are reviewable by the Supreme Court only on its granting of a writ of certiorari—in short, by permission and not as of right.[5] This includes criminal cases, either at the instance of the appellant, or, when a judgment of conviction has been reversed, on petition for a writ of certiorari filed by the United States.

Judgments of the United States Court of Claims (rendered in suits against the United States based on the Constitution, or on a federal statute, or on a contract)[6] and of the United States Court of Customs and Patent Appeals are similarly reviewable by the Supreme Court only by certiorari. Con-

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1. Direct appeal from a District Court to the Supreme Court lies in six kinds of cases: (1) From any decision invalidating an Act of Congress (28 U.S.C. §1252). (2) From a decision of a three-judge District Court (28 U.S.C. §1253) in a proceeding to enjoin on grounds of unconstitutionality the enforcement of a federal statute (28 U.S.C. §2282) or (3) of a state statute (28 U.S.C. §2281; see *Florida Lime Growers* v. *Jacobsen*, 362 U. S. 73), or (4) in a proceeding to set aside an order of the Interstate Commerce Commission (28 U.S.C. §2325). (5) From the final decree in an antitrust action brought by the Government (15 U.S.C. §29). (6) By the United States in certain criminal cases, primarily where the indictment is set aside in the course of construing the statute (18 U.S.C. §3731).

2. 28 U.S.C. §1291.

3. Generally, appeal lies as of right from any order granting or refusing an injunction, and a few others duly specified. 28 U.S.C. §1292(a). Certain other interlocutory orders may now be appealed if both the District Judge and the Court of Appeals permit, on the footing that there is involved a controlling question of law, the resolution of which "may materially advance the ultimate termination of the litigation". 28 U.S.C. §1292(b).

4. Orders of the Interstate Commerce Commission are still reviewable only by three-judge district courts. 28 U.S.C. §2325. This results from the historic accident that such a review was provided by the Urgent Deficiencies Act of 1913 in succession to the jurisdiction of the then recently abolished Commerce Court. See Robertson and Kirkham, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES (Kurtland and Wolfson ed. 1951) §213; Frankfurter and Landis, THE BUSINESS OF THE SUPREME COURT, 148-174; *United States* v. *Interstate Commerce Commission*, 337 U. S. 426. Every effort to conform review of Interstate Commerce Commission orders to the pattern of review provided for the other federal regulatory commissions and agencies has been tenaciously resisted by the commerce Bar.

5. 28 U.S.C. §1254(1). There is also a very limited jurisdiction to review judgments of United States Courts of Appeals on appeal, 28 U.S.C. §1254(2), as well as on certificate, as to which see 28 U.S.C. §1254(3). The latter jurisdiction is not now very important, as the Supreme Court has rigidly curtailed its exercise. *E.g.*, *Wisniewski* v. *United States*, 353 U. S. 901. See Stern and Gressman, SUPREME COURT PRACTICE (2d ed. 1954) 257-263; Robertson and Kirkham, *op. cit. supra* note 4, §§135-166.

6. For the jurisdiction of the Court of Claims, see 28 U.S.C. §§1491-1505. English lawyers will no doubt be surprised to learn that officers and employees of the United States, including officers and men of the Armed Forces, may sue as of right in the Court of Claims for their pay and allowances.

victions by court martial are reviewed by a civilian Court of Military Appeals, whose judgments are not subject to further review by other courts of the United States.[7] Judgments in military cases are reviewable only collaterally, by way of habeas corpus[8] or by a suit for back pay.[9]

Within each state, there is a state court of general jurisdiction. In some states that tribunal will be designated as the Superior Court, in others it is termed the Court of Common Pleas,[10] in still others the Circuit Court, while in New York the court of general and original jurisdiction is called the Supreme Court.[11] Every state also has a court of last resort, generally known as the Supreme Court, but sometimes styled, as in New York, Kentucky and Maryland, the Court of Appeals.[12] In many states, because of the volume of appeals, there is an intermediate appellate court as well.[13] Indeed, more and more states are revising their judicial systems to include such a tribunal, to ease the work load of their courts of last resort.

Final judgments of state courts may be reviewed by the Supreme Court of the United States if there is a federal question in the case, *i.e.*, one arising under the Constitution or laws of the United States, and if that federal question has been timely and properly raised below.[14] State cases not involving federal questions cannot be reviewed by the Supreme Court of the United States. Thus—without going into details, because the fringes of the problem are very complex—an action on a contract or a dispute over title to real estate litigated in a state court can go no farther than the highest court of the state unless some federal question is involved. But if the contract involves the interpretation of a federal statute, such as a price control act,[15] or if the land title involves the effect of a treaty,[16] then the requisite federal question is present, and the United States Supreme Court may review. Final judgments of the highest court of a state in criminal cases are thus reviewable by the Supreme Court of the United States whenever there is presented a substantial constitutional question, of which the most usual instance in such cases is a showing that the proceedings would deprive the defendant of life or liberty without due process of law.

Contacts with Counsel

There are no barristers or solicitors in the United States, nor do we have any rank corresponding to Queen's Counsel. A lawyer is admitted to practice originally by the highest court in his own state, and that normally entitles him to practice in all the courts of that state. He may then go on to seek admission to the Bars of the various federal courts, many of which require that the applicant shall have been a member of a state bar for a given number of years.[17] Three years after admission to practice before the highest court of his own state, a lawyer is eligible to be admitted to the Bar of the Supreme Court of the United States.[18]

Any lawyer may, of course, talk freely to his client, to his witnesses and to the lawyers on his own and the other side. (Trial counsel who does not personally interview all his own witnesses in advance of trial is considered derelict in his duty.) On appeal, such contacts are necessarily more limited, because what the witnesses have said is in the record; but the same freedom is there.

How, then, is counsel retained for an appeal? Usually, the lawyer—or the firm, because law partnerships are normal and not in any sense at all exceptional—who handled the trial goes on to deal with the appeal. If for any reason it is desired to associate or retain different counsel on appeal, such new counsel can be approached either by trial counsel or by the client himself. And such approaches may be and are often extremely informal. If I may refer to my personal experience as appellate counsel, it is the fact that my most important (and most lucrative) appeals came to me over the telephone.

It is of course desirable to reduce the terms of the retainer of appellate counsel to writing. Retainers on a partially contingent basis—*i.e.*, payment of an additional fee in the event of success on appeal—are quite common. I suspect that appellate retainers on a wholly contingent basis are not unusual. However unwise they may be for a lawyer, they are not at all unethical. The larger firms are less inclined to accept contingent retainers, but that disinclination does not rest on ethical grounds. They eschew such arrangements only because they disapprove (or do not find it necessary to assume) the financial risks inherent in betting on the outcome of an appeal.

It should be added that an American lawyer is under no obligation whatever to take an appeal tendered to him; he is free to turn it down on any ground—the inadequacy of the fee,

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7. See *Shaw* v. *United States*, 209 F. 2d 811 (D.C. Cir.), although the principle that denies direct review of military judgments is much older. *Ex parte Vallandigham*, 1 Wall. 243; *In re Vidal*, 179 U. S. 126. The military appellate provisions currently in force are Articles 60-69 of the Uniform Code of Military Justice, 10 U.S.C. §§860-869.

8. *E.g.*, *Reid* v. *Covert*, 354 U. S. 1; *Ex parte Quirin*, 317 U. S. 1; *Ex parte Milligan*, 4 Wall. 2.

9. *E.g.*, *Swaim* v. *United States*, 165 U. S. 553; *United States* v. *Brown*, 206 U. S. 243; *Shapiro* v. *United States*, 107 Ct. Cls. 650, 69 F. Supp. 205.

10. As in Ohio and Pennsylvania, thus preserving the style of England's first permanent court (1178-1875).

11. Illogical? Certainly—but it will hardly be open to those who practice in the non-supreme Supreme Court of Judicature to cast the first stone.

12. In Virginia and West Virginia, the court of last resort is the Supreme Court of Appeals; in Massachusetts and Maine, it is the Supreme Judicial Court; while in Connecticut it is the Supreme Court of Errors.

13. In Alabama and Georgia, the intermediate appellate court is the Court of Appeals; in California there are several District Courts of Appeal; in Illinois the intermediate court is the Illinois Appellate Court; while in New York each of four Departments has an Appellate Division of the Supreme Court. Thus it follows that while in Alabama and Georgia the Court of Appeals is the intermediate tribunal while the Supreme Court is the court of last resort, in New York it is the Court of Appeals which is the court of last resort while the Supreme Court is the court of original and of intermediate appellate jurisdiction. (All of which illustrates the advisability of avoiding generalizations.)

14. See 28 U.S.C. §1257. Briefly, if a state statute has been sustained as against a federal claim of invalidity, or if a federal treaty or statute has been held invalid, review is by way of appeal; all others are reviewable only on certiorari. Under 28 U.S.C. §2103, an appeal from a state court improvidently taken must be regarded and acted upon as a petition for certiorari.

For a brief exposition of what qualifies as a federal question, and how it must be raised, see Stern and Gressman, *op. cit. supra* note 5, at 81-100.

15. *Testa* v. *Katt*, 330 U. S. 386.

16. *Clark* v. *Allen*, 331 U. S. 503.

17. In the District of Columbia, of course, there is only a single court, which, *vis-à-vis* the courts of the several states, has a dual jurisdiction. See *O'Donoghue* v. *United States*, 289 U. S. 516; *Pitts* v. *Peake*, 60 App. D.C. 195, 50 F. 2d 485.

18. U. S. Supreme Court Rule 5(1).

the fact that he wants to go on vacation or is too busy, or simply because he does not want to represent the prospective client. Most of the larger law firms do not handle the usual criminal appeals (except when appointed by an appellate court to represent an indigent) and this does not expose them to censure or disapproval. Any lawyer is free to turn down any case or class of case.

Taking the Appeal

In the federal system, an appeal to a Court of Appeals is taken by filing a notice of appeal in the District Court, within the time specified, and by filing the record of the case with the Court of Appeals.[19]

Appeals to the United States Supreme Court—the word "appeal" is a technical one in that connection—are similarly taken, but the appellant must thereafter file a jurisdictional statement with the Supreme Court, which may dismiss or affirm the appeal without a hearing if a showing of substantiality warranting oral argument is not made.[20]

Review by certiorari is sought by filing the record in the Supreme Court, together with a petition for certiorari, the latter being a printed argument which aims to show that the questions presented have sufficient public importance to justify consideration of the case.[21]

The appellee in a case on appeal, and the respondent in a case on certiorari, may then file his printed argument in opposition to review. The Court considers both, and enters an order either affirming the judgment on appeal, dismissing the appeal, denying certiorari — or else noting probable jurisdiction of the appeal or granting certiorari, either of which latter orders involves setting the cause down for argument.[22]

Appeal practice in state courts varies; some proceed by notice of appeal, others still use the old bills of exceptions and writs of error. Many states provide for discretionary appeals, *i.e.*, by permission of either the lower or the higher court concerned, or, in some instances, by a single judge of the latter.

The Record

In virtually all American trials, all testimony is taken down verbatim by a stenographer—some are shorthand reporters, some use a stenotype machine, some a sound-mask. The trial judge never functions as a shorthand writer—and probably 80 per cent of American lawyers would not know what is meant by the English term "judge's notes".

At any rate, when the appeal is perfected, all of the pleadings and all of the transcript of testimony are taken to the appellate court, either in the form of a certified copy, or—now more frequently—by transmitting the original papers to the clerk of the appellate court.[23]

In many state courts, and in many federal criminal cases, the appeal is heard on the single set of original unprinted papers. In other states, and in some federal circuits, virtually the entire record must be printed before the appeal is heard. In still other states, and in an increasing number of federal circuits, the pertinent portions of the record are printed in an appendix by the appellant (or by both parties jointly, if agreement is possible). Where no agreement on a joint appendix is reached, the appellee is free to print an additional appendix containing any omitted extracts which he deems important.

In the Supreme Court of the United States, decision to grant or refuse review is made on the record as transmitted from the court below, which may or may not be printed.[24] But no case is argued on the merits until after the record as settled by both parties has been printed under the clerk's supervision.[25]

Frederick Bernays Wiener is a Washington lawyer who specializes in appellate proceedings. He is the author of *Effective Appellate Advocacy*, a new version of which is scheduled to appear next winter under the title, *Briefing and Arguing Federal Appeals*. In 1953-1954 he served as Reporter to the Committee of the Supreme Court of the United States on the Revision of its Rules.

Composition of the Appellate Court

The composition of the Supreme Court of the United States is constant, and so is that of many state appellate courts.

The composition of United States Courts of Appeals fluctuates. Generally three judges sit, but since nine of the eleven circuits have more than three judges, the composition of the panel varies. Moreover, District Judges, retired Circuit Judges, and judges from other circuits are eligible to, and frequently do, sit.[26] Resolution of intra-

19. See 28 U.S.C. §2107; Rule 73, Federal Rules of Civil Procedure (hereinafter F.R. Civ. P.); Rule 37, Federal Rules of Criminal Procedure (hereinafter F.R. Crim. P.).

20. U. S. Supreme Court Rules 10-13, 15, 16(4); see Stern and Gressman, *loc. cit. supra* note 14, for a discussion of the requirement of substantiality.

21. U. S. Supreme Court Rules 19-23; see Stern and Gressman, *op. cit. supra* note 5, at 106-141, for a discussion of the public importance requisite for review on certiorari.

22. Supreme Court Rules 16, 24, 25.

23. See Rule 75(i), F.R. Civ. P.; Rule 39(b), F.R. Crim. P.; and the rules of the several United States Courts of Appeals. See Stewart, *Comments on the Original Papers Rule*, 22 F.R.D. 211.

24. U. S. Supreme Court Rules 12, 13, 21. For the considerations underlying the abolition of the older requirement that the record must be printed prior to consideration of the petition for writ of certiorari, see my paper on *The Supreme Court's New Rules*, 68 HARV. L. REV. 20, 54-59 (1954).

25. U. S. Supreme Court Rules 17, 26 and 36.

26. See 28 U.S.C. §§291-296. Under 28 U.S.C. §§42 and 43, the Justice of the Supreme Court assigned as Circuit Justice to a particular circuit may sit and write an opinion as a member of the Court of Appeals. (*E.g., Lago Oil & Transport Co. v. United States*, 218 F. 2d 631 (2d Cir.). See Robertson and Kirkham, *op. cit. supra* note 4, at 943-947.

circuit conflicts is effected by hearings in banc, which in some circuits means a bench of nine judges.[27]

Many state appellate courts sit in divisions or panels, with provision for replacement of temporarily disqualified members.

Written Arguments

A distinctive feature of American appellate practice is the written—generally printed—argument or, as it is called here, the brief—which is wholly unlike the document, also called a brief, that an English barrister receives from a solicitor. The nearest British analogy is the printed "case" in the House of Lords.[28]

The brief should be—but, alas! only too frequently is not—a complete, self-contained written argument on behalf of the respective parties to the appeal. It sets forth the facts out of which the case arises, the pertinent statutes, regulations and constitutional provisions involved, and then makes a carefully arranged legal argument on the issues involved.

Since the rules of most federal circuits—and of some state courts—limit the length of briefs as well as the length of reply briefs, it will be apparent that an appellate brief is not a document that can be lightly thrown together.

A good brief requires—and will reflect—a combination of learning, logic and literary qualities.

Oral Argument

The other distinctive feature of American appellate practice is the limited oral argument—thirty, forty-five, or sixty minutes on a side. More time can be obtained only on a compelling showing of necessity, based on the complexity of the case.

This means that the appellate advocate on his feet must be prepared to strike at once at the jugular. He cannot indulge in peripheral musings, he cannot read long quotations from earlier decisions, and he must frankly relegate to the written arguments in his brief all discussion of matters too complicated to be usefully conveyed orally to the judges of the appellate court.

It was Dr. Johnson who remarked that "When a man knows he is to be hanged in the morning, it concentrates his mind wonderfully." Well, when an advocate knows that he has only half, or three-quarters, or a single hour, he had better concentrate his argument wonderfully—because unless he does, he will never be able to get through all that he needs to tell the court.

In the Supreme Court of the United States, a case on the summary calendar gets thirty minutes on a side, and one on the regular calendar sixty minutes per side.[29] Yet the Justices say, with remarkable unanimity, that they derive great help from these abbreviated arguments,[30] and the Court's current rules and practice join in discouraging submission without oral argument.[31]

More and more state courts of last resort require that all cases be orally argued.[32]

Only rarely will any American appellate court listen to more than two counsel on a side; in many situations and cases only one will be heard;[33] and the Supreme Court of the United States has expressed in its rules its preference for argument by a single advocate on a side.[34] This has the advantage that always attends avoidance of a dispersion of effort,[35] and of course dispenses with the elaborate apparatus of juniors and Q. C.'s so familiar to the English Bar. Indeed, there is no requirement that the lawyer who argues the case be accompanied by others, regardless of his own seniority or standing at the Bar.

Most American appellate judges wear plain black robes. American lawyers have never worn wig or gown, at least since wigs went out of fashion *circa* 1800, and counsel arguing an appeal in any court normally wears a business suit. Formal dress—morning coat, or, more precisely, a cutaway—is no longer required anywhere. Government lawyers and "leaders of the Bar" wear formal dress in the Supreme Court of the United States. Years ago, the Massachusetts Bar invariably appeared before the Supreme Judicial Court of that commonwealth in cutaways, on occasion worn with a soft shirt and a colored tie; I understand that, "apart from a few", the old custom has disappeared since World War II. Twelve years ago I ventured to appear in formal dress in the United States Court of Appeals for the First Circuit, in Boston, and was told privately by the then Chief Judge that they were similarly favored by only a single resident advocate.

Decisions

American courts distinguish between "opinions"—the views expressed by the judges either for the court or for themselves if dissenting—and the "judgment", which is the formal document affirming, modifying or reversing the ruling below. A learned English law teacher considers the American terminology more precise;[36] no matter, precise or otherwise, we use it as just indicated.

Our appellate opinions are always written, and never delivered in open court after argument; only very, very rarely will there be an oral affirmance

27. See 28 U.S.C. §46(c); *Western Pacific Railroad Case*, 345 U. S. 247; *United States* v. *American-Foreign S. S. Co.*, 363 U. S. (decided June 20, 1960).

28. See House of Lords, *Directions as to Procedure* (1959) Dir. No. 13, 14, 16, 20, 22, 24(ii); S.O. VI, IX.

29. U. S. Supreme Court Rule 44.

30. Hughes, THE SUPREME COURT OF THE UNITED STATES (1928) 62-63; Frankfurter, J., in *Rosenberg* v. *Denno*, 346 U. S. 371, 372; Jackson, *Advocacy Before the Supreme Court: Suggestions for Effective Case Presentations*, 37 A.B.A.J. 801 (1951); Harlan, *What Part Does the Oral Argument Play in the Conduct of an Appeal?*, 41 CORN. L. Q. 6.

31. U. S. Supreme Court Rule 45(1): "The court looks with disfavor on the submission of cases on brief, without oral argument, and therefore may, notwithstanding such submission, require oral argument by the parties." In the first instance of a submission after the adoption of that Rule, the Court denied leave to submit, and appointed Dean Griswold of Harvard to argue as *amicus curiae* in support of the respondent. *Granville-Clark* v. *Granville-Clark*, 348 U. S. 885, 349 U. S. 1, 4.

32. *E.g.*, the Supreme Court of New Jersey in its Rule 1:4-1 provides that "All appeals shall be argued orally."

33. U. S. Supreme Court Rule 44(3); and see the rules of the several United States Courts of Appeals.

34. U. S. Supreme Court Rule 44(4): "Divided arguments are not favored by the court."

35. See Jackson, *op. cit. supra* note 30 at 801-802: "If my experiences at the bar and on the bench unite in dictating one imperative, it is: Never divide between two or more counsel the argument on behalf of a single interest. . . When two lawyers undertake to share a single presentation, their two arguments at best will be somewhat overlapping, repetitious and incomplete and, at worst, contradictory, inconsistent and confusing. . . If I had my way, the Court rules would permit only one counsel to argue for a single interest. But while my colleagues think such a rule would be too drastic, I think they all agree that an argument almost invariably is less helpful to us for being parceled out to several counsel."

36. Gower, *Legal Training in the U.S.A.*, 3 J. Soc. PUB. TEACHERS OF LAW [N.S.] 153, 157, note 2.

per curiam without opinion, and then only in appeals that are utterly and clearly without merit.[37]

It is not the practice in American courts for each judge to file a separate opinion; rather one member of the tribunal writes the "Opinion of the Court". But there is no limitation on dissents, and concurring opinions are becoming more frequent.[38]

In almost all courts, state and federal, the opinions when agreed upon are filed with the clerk, who then sends copies to counsel. Only in the Supreme Court of the United States is oral announcement made of the substance of the written opinions. Frequently the oral delivery does not exactly parallel what has been written; this may not enhance the *elegantia juris*, but certainly it assists the lawyers in the courtroom in understanding—and in attempting to predict—the judicial trend.

American appeals are apt to be time-consuming, what with printing the record, printing the briefs, and then waiting for the decision. But "Reflection is a slow process. Wisdom, like wine, requires maturing." These words, from a non-concurring opinion, emphasize the dangers inherent in decision by deadline—and indeed, that very case, in which a different result was reached a year later on rehearing, stands as a warning against hasty decision.[39]

Costs and Counsel Fees

In the United States, the costs paid by the losing party do not include attorneys' fees (except, by statute, in very limited classes of cases).[40] In some state courts, the costs include the printing of the briefs; that item is not included in most federal bills of costs. But costs everywhere cover the price of printing the record or the appendix, and this is an item which can be quite frightening. *E.g.*, in a regulatory case in the Supreme Court of the United States, a bill of $12,500 for printing the record is about par for the course. *E.g.*, in a criminal appeal in which the record was drastically compressed because only pretrial issues were presented, the cost of printing the record was $2,750. The cost of printing makes American appeals an expensive luxury, particularly since the party winning against the United States or any agency thereof is not entitled to costs.[41]

Counsel fees are another story. There is no set fee for an appeal and no real minimum, except in some communities, where the local bar association may have adopted a schedule. It is safe to say that few lawyers will undertake an appeal for a fee of less than $500, except of course as a favor for a friend or as a matter of "principle". (The foregoing sentence was passed with approval by two appellate lawyers to whom I showed a draft of the present paper; one has practiced alone in New York for many years, the other was a member of a large Washington firm. But a third lawyer, the senior partner in a large Chicago firm, wrote, "I do not think that in Chicago a fee on appeal, even for the appellee, should ever be less than $1,250. Actually, $3,500 for the appellant in almost any kind of a case is more in keeping with the time a careful job demands. It is terribly hard to generalize, but surely your $500 minimum is a rural figure.")

Much will depend on whether the lawyer on appeal is new to the case or whether the appeal is a further step in a litigation with which he is already intimately familiar. Other variables are the size of the record, the importance of the case to the client, and, inescapably, the client's state of solvency. The ability or reputation of the lawyer or the law firm is of course a significant factor. It is impossible to generalize, and, since we have no Taxing Masters, data as to fees are hard to come by. Probably it is safe to venture that fees in matters in the Supreme Court of the United States will run from the low four to the high five figures—a not inconsiderable spread. It is believed that the highest fee paid for a single appeal in recent years, in the Steel Seizure case,[42] was either $100,000 or $125,000. This, of course, was for professional services in connection with a single argument. Higher contingent fees are probably not uncommon, depending of course on the nature and extent of the contingency so far as the client is concerned.

Poor Persons' Causes

In law as in medicine, the rich can afford the services, the middle-income group cannot, and the poor get theirs gratis.

The last few years have seen a rapid expansion in poor persons' cases—the *in forma pauperis* matters. If an individual can show that he has no means,[43] he can proceed without payment of costs and on typewritten papers;[44] he can similarly appeal at public expense; and, in criminal cases, the public pays for such printing or reproduction of the record as may be necessary,[45] and the appellant will be provided with court-appointed counsel, who must appear as advocates and not simply as friends of the court.[46] Such appointments must be accepted, and frequently involve leaders of the Bar whose services the indigent defendant could never hope to retain with his own resources. The problem here, of sifting out the cases that are meritorious, or at least arguably substantial, from those that are wholly frivolous, has not yet been solved, if indeed it is capable of solution.[47]

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37. *E.g.*, *Commers* v. *United States*, 159 F. 2d 248 (9th Cir.), certiorari denied, 331 U. S. 807; *Ida Goldblatt Sons* v. *Commissioner*, 276 F. 2d 208 (2d Cir.); *Cortley Fabrics Company* v. *Aetna Casualty & Surety Company*, 276 F. 2d 208 (2d Cir.)

38. See 73 HARV. L. REV. at 132 for a table showing the number of concurring and dissenting opinions written by the members of the United States Supreme Court at their October, 1958, Term.

39. *Reid* v. *Covert*, 354 U. S. 1, withdrawing opinions in *Kinsella* v. *Krueger*, 351 U. S. 470, and *Reid* v. *Covert*, 351 U. S. 487. The earlier quotation is from the opinion of Frankfurter, J., reserving judgment in *Kinsella* v. *Krueger*, 351 U. S. 470 at 485.

40. *E.g.*, in treble damage suits under the antitrust laws (15 U.S.C. §15); as a matter of discretion in cases of copyright infringement (17 U.S.C. §116); in "exceptional cases" of patent infringement (35 U.S.C. §285); in actions under the Fair Labor Standards Act (29 U.S.C. §216(b)); and as a part of a reparation award in water carrier cases (49 U.S.C. §908(e)). This listing is illustrative and not in any sense exhaustive.

41. 28 U.S.C. §§2408, 2412(a); U. S. Supreme Court Rule 57(5).

42. *Youngstown Co.* v. *Sawyer*, 343 U. S. 579.

43. It is not necessary to show complete destitution as a prerequisite to being allowed to proceed *in forma pauperis*. *Adkins* v. *DuPont & Co.*, 335 U. S. 331.

44. 28 U.S.C. §1915; U. S. Supreme Court Rule 53.

45. See *Griffin* v. *Illinois*, 351 U. S. 12, holding that the refusal of a state to furnish a convicted indigent with a complete transcript, where the right of appeal is granted by statute, violates the due process and equal protection clauses of the Fourteenth Amendment to the Federal Constitution.

46. See *Ellis* v. *United States*, 356 U. S. 674, 675, reversing 249 F. 2d 478 (D.C. Cir.).

47. Compare Ridge, *The Indigent Defendant*, 24 F.R.D. 241.

By Way of Conclusion

No American court considers itself powerless, like the House of Lords,[48] to overrule its earlier decisions, and, particularly in the Supreme Court of the United States, many, many of the earlier landmarks have been overruled.[49] State courts of last resort, which deal primarily with questions of private law, questions that do not normally involve constitutional issues and hence are susceptible of correction by a legislature, are more inclined to hew to the line of *stare decisis*. Nonetheless, the power to blaze new trails (and to overrule prior decisions in the process) is there, and is exercised on occasion.

Consequently, the American appellate lawyer not only is more free to argue principle in preference to precedent, but he is far less apt to be awed by what a particular judge has said on the precise point in the past. Nowhere in American opinions will be found the judicial deference to the exact phraseology of prior judicial utterance that is commonplace in the English reports. The result is that an American appellate lawyer has far wider scope for influencing the path of the law.

The two quotations which follow are from addresses by Mr. Justice Holmes, made while on circuit in Massachusetts over seventy years ago, in response to resolutions of the Bar on the passing of its members:

> The external and immediate result of an advocate's work is but to win or lose a case. But remotely what the lawyer does is to establish, develop, or illuminate rules which are to govern the conduct of men for centuries; to set in motion principles and influences which shape the thought and action of generations which know not by whose command they move. The man of action has the present, but the thinker controls the future; his is the most subtle,[50] the most far-reaching power.[51]
>
> * * *
>
> And the record which remains of them is but the names of counsel attached to a few cases.
>
> Is that the only record? I think not. Their true monument is the body of our jurisprudence,—that vast cenotaph shaped on the genius of our race, and by powers greater than the greatest individual, yet to which the least may make their contribution and inscribe it with their names. The glory of lawyers, like that of men of science, is more corporate than individual. Our labor is an endless organic process. The organism whose being is recorded and protected by the law is the undying body of society. When I hear that one of the builders has ceased his toil, I do not ask what statue he has placed upon some conspicuous pedestal, but I think of the mighty whole, and say to myself, He has done his part to help the mysterious growth of the world along its inevitable lines towards its unknown end.[52]

Thoughts such as those are for the future. Speaking more immediately, and on a more mundane plane, what I like about arguing an appeal is its stimulation, its excitement, its opportunity to persuade an audience—and the constant, indeed eternal hope, that it will win the case.

Those aspects, I feel certain, apply equally to the argument of any appeal in Britain. Thus there is, inescapably, an essential bond of professional understanding between English-speaking appellate lawyers on both shores of the Atlantic.

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48. *London Street Tramways Co.* v. *London County Council*, [1898] A.C. 375.

49. Blaustein and Field, *"Overruling" Opinions in the Supreme Court*, 57 MICH. L. REV. 151, 184-194. For the most recent instance, see *Elkins* v. *United States*,—U. S.—(June 27, 1960), overruling the state seizure aspect of *Weeks* v. *United States*, 232 U. S. 383, 398 (1914).

50. So spelled in Worcester's DICTIONARY (1860), which Holmes (Harvard College, 1861) always used.

51. Holmes, *Sidney Bartlett* [1889], in SPEECHES (1913) 41, 43-44.

52. Holmes, *Daniel S. Richardson* [1890], in SPEECHES (1913) 46, 47-48.

Internal Revenue Chief Counsel Will Address University of Chicago Tax Conference

Hart Spiegel, Chief Counsel for the U. S. Internal Revenue Service, will be among the speakers October 26 at the opening session of the University of Chicago Law School's 13th Annual Federal Tax Conference.

Mr. Spiegel's subject will be "Current Operations in the Chief Counsel's Office".

The annual tax conference is sponsored by the University's Law School in co-operation with the University College. It is set to run from October 26 through October 28, in the Auditorium of the Prudential Building in Chicago.

A tentative schedule announced by Frederick O. Dicus, Chairman of the conference planning committee, calls for both morning and afternoon sessions each day.

The purpose of the conference is to inform tax attorneys and others of changing trends in the federal tax structure and proposed legislation which could affect taxes.

Hotel reservations for the three-day conference can be obtained by contacting Robert Bruce Phillips in the Sales Department of the Conrad Hilton Hotel.

All past conference members will receive tentative and then permanent schedules for the fall conference.

The Federal Bureau of Investigation: The Protector of Civil Liberties

by J. Edgar Hoover • *Director of the Federal Bureau of Investigation*

THE BASIC CONFLICT in the world today is between the concepts of a government of law and a government of men—of democracy versus totalitarian Communism. How this issue is ultimately resolved will decide the fate of mankind for many generations to come.

The terrifying reality of the brutal abuse of power—how one man, Joseph Stalin, in frenzies of self-grandeur and egotism, controlled the lives of literally millions of people—was vividly depicted by Nikita Khrushchev before the 20th Party Congress of the Communist Party of the Soviet Union in 1956. All too often forgotten today, this speech affords an appalling insight into the cauldron of terror and fear which is created when law does not exist.

Coming from the Communists, particularly the number one Soviet Communist, the portrait of a tyrannical Stalin, brutally suspicious and cunningly cruel, becomes more meaningful. Here was a man who, through deceitful skill, concentrated all reins of government into his own hands. Just to enter into his physical presence meant personal risk. "It has happened sometimes", a former associate reported, "that a man goes to Stalin on his invitation as a friend. And when he sits with Stalin, he does not know where he will be sent next, home or to jail."

In this regime of personal power, the law became what Stalin said it was. He was the prosecutor, the judge, the jury, the court of final appeal—all rolled up into one brutal club of oppression. In the widely publicized case of the so-called "Russian Doctors" (referring to the doctors arrested in 1953 just prior to Stalin's death on charges of treason but later released) Stalin personally issued orders for the conduct of the investigation. "Confessions" were to be secured. "If you do not obtain confessions from the doctors", Stalin reportedly told his Minister of State Security, "we will shorten you by a head."

Needless to say, the doctors "confessed". Khrushchev's comments in this connection tell us most graphically how a dictatorship works; how different it is from a government of law where the dignity of the human personality has meaning. "Stalin personally called the investigative judge, gave him instructions, advised him on which investigative methods should be used; these methods were simple—beat, beat and, once again, beat." "The case was so presented that no one could verify the facts on which the investigation was based. There was no possibility of trying to verify facts by contacting those who had made the confessions of guilt."

Such tactics, again according to Khrushchev, meant "mass arrests and deportations of many thousands of people, execution without trial"—"in the main, and in actuality, the only proof of guilt used, against all norms of current legal science, was the 'confession' of the accused himself; and, as subsequent probing proved, 'confessions'

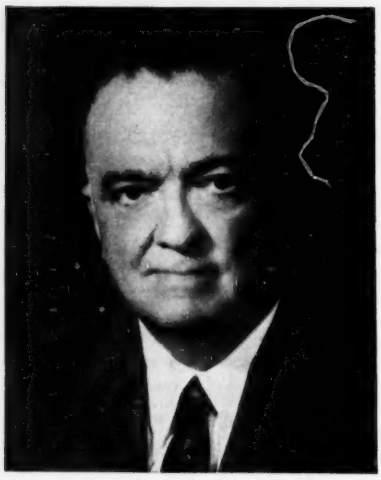
Dear Fellow Members of the American Bar Association:

I want to take this opportunity of expressing the sincere wish that the annual meeting of the American Bar Association to be held in Washington from August 29 through September 2, 1960, will be a most successful and enjoyable one.

While you and your guests from abroad are in our Nation's capital, I do hope that as many of you as possible, together with your families and guests, will stop by FBI Headquarters and visit us. Our guided tours are conducted from 9:30 A.M. until 4:00 P.M. each weekday, exclusive of holidays. A special F.B.I. tour desk will be located at The Statler-Hilton for your convenience in scheduling your tour. They last about one hour, and it would indeed be a privilege to welcome you to our facilities.

We in the FBI deeply appreciate the wonderful cooperation which the American Bar Association and its members have always given our Special Agents, and we are looking forward to the pleasure of seeing each of you.

Sincerely yours,
J. EDGAR HOOVER



J. Edgar Hoover became Director of the Federal Bureau of Investigation in 1924. Born in Washington, D. C., he attended George Washington University (LL.B. 1916, LL.M. 1917) and is a member of the District of Columbia Bar.

were acquired through physical pressures against the accused".

The Communist System—Terror and Brutality

This is the testimony of the Communist system—a system of terror and brutality which at this very minute *still* crushes the minds, bodies and hearts of millions of men, women and children around the world. Under a dictatorship, the historic principles of justice, mercy and fair play are abrogated. Whim, prejudice and suspicion become the ruling motifs. Habeas corpus, fair trials, law enforcement agencies dedicated to securing the true facts —these are not the ingredients of a dictatorship. Communist propaganda talks much about "Socialist legality", proclaiming that Communist morality is superior to "bourgeois ethics". But, these mouthings are Aesopian language, designed to conceal the true facts. Under Communism the judicial system exists to enforce the will of the state and the Party, as defined by the ruling clique, not to secure justice for the individual.

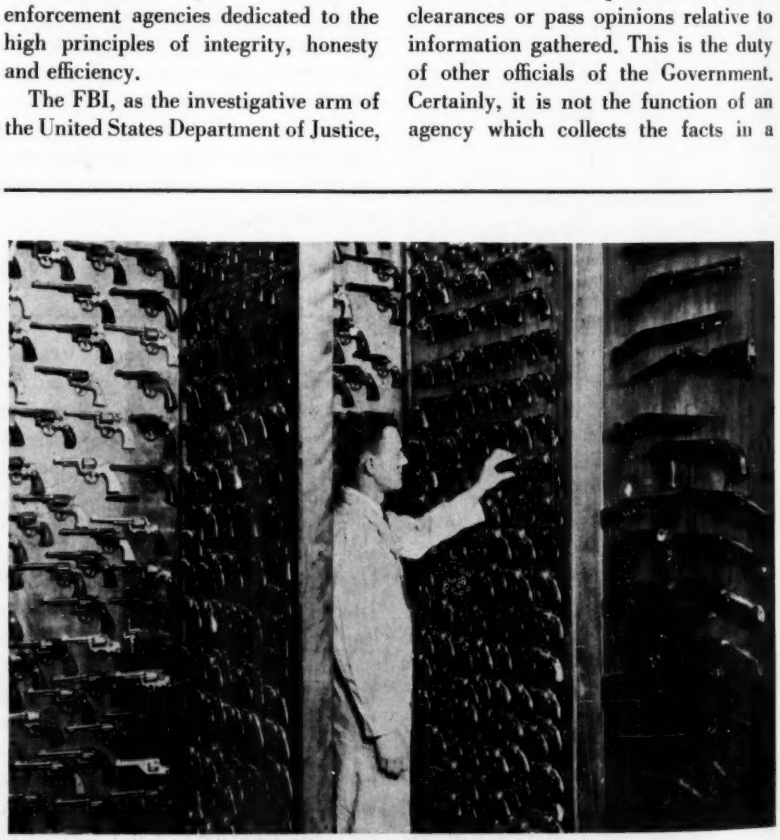
In Great Britain and the United States, partners in the fight for freedom, the dignity of the law—as contrasted with the tyrannical power of a human ruler—gives validity to our democratic way of life. A man's home may be ever so humble, so humble that the winds and the rains pour through its thatchless roof, yet that dwelling is inviolate from any arbitrary intrusion of the government. That man has certain rights under the law which guarantee to him the privilege of freedom. This is the great tradition of liberty which we in America have inherited from English law.

The law enforcement agency—whether local, state or national—is an integral part of the judicial framework of freedom. In fact, the judicial system can operate fairly and effectively only when the complete and accurate facts are revealed in the course of the legal proceedings—facts which are unalloyed by personal prejudice, whim or bias. Most vital in determining the guilt or innocence of the accused is that the official authorities—the judge, the jury, the court officials—know all the facts. This can occur only if there are law enforcement agencies dedicated to the high principles of integrity, honesty and efficiency.

The FBI, as the investigative arm of the United States Department of Justice, is dedicated to preserving the liberties which form the fabric of our constitutional government. In my thirty-six years as Director, this has been the main principle motivating its existence. The FBI is a servant of the American people, working around the clock to protect their rights, lives and property.

By no stretch of the imagination is the FBI a national police agency. In fact, as is well known, the FBI's jurisdiction is strictly limited. At all times the FBI is under the supervision of the Attorney General and the President. Each year I appear before committees of the Congress to explain the operations of the FBI. Our procedures are closely scrutinized when FBI cases come before the courts of the nation. Moreover, an alert press is constantly vigilant to the work of the FBI. Hence, only the highly misinformed can call the FBI a "Gestapo" or an agency threatening our civil liberties.

The FBI, moreover, is strictly a fact-gathering agency. It does not make recommendations or evaluations, authorize or decline prosecution, issue clearances or pass opinions relative to information gathered. This is the duty of other officials of the Government. Certainly, it is not the function of an agency which collects the facts in a



Part of the firearms reference collection in the FBI Laboratory.

given situation to also pass judgment on them. This differentiation is a salient feature of democratic law enforcement.

The basic duty of the FBI is to investigate violations of the laws of the United States, to collect evidence in cases in which the United States is or may be a party in interest, and to perform other duties required by law or administrative directive. The FBI performs these functions, yet scrupulously protects the liberties of the individual. The criminal and the subversive must be defeated, yet the historic rights of the individual must be held inviolate.

The FBI— A High Code

Most important in protecting civil liberties is the maintenance of a high code of ethics by law enforcement. Every Special Agent of the FBI is dedicated to upholding the dignity of the law. He holds an inner allegiance to those ideals of justice and fair play which have made this nation great. He is a man of integrity who does his job honestly, fearlessly and zealously. In these days of payola, he does not allow personal temptation and insidious favoritism to interfere with the validity of his investigation. He is impervious to the glib tongue of the "fixer" or the undercover gift of the unscrupulous. He does his job without fear of outside intimidation, political reprisal or competitive undercutting. He is guided at all times by loyalty to his agency, to his profession, to a way of life. This is the integrity, I am proud to say, which is the kernel of FBI operations and the rock upon which good law enforcement rests.

Vital in developing a high ethical code of law enforcement operations are high standards of personnel recruitment and training. The FBI maintains rigid physical, educational and moral standards in the selection of personnel, both Special Agent and clerical. To be eligible for appointment as a Special Agent, for example, applicants must be between 25 and 40 years of age; graduates of state-accredited resident law schools or four-year resident accounting schools with at least three years of practical accounting or auditing experience. Graduates of law or accounting schools not requiring at least a resident junior college degree, or its equivalent of resident college work, as an admission prerequisite must have received at least a degree from a resident junior college, or its equivalent in resident college work. The applicant must also be able to pass a rigid physical examination. Before being offered an appointment, qualified applicants are comprehensively investigated to determine whether they possess unqualified personal integrity and character.

Toolmark examination, FBI laboratory

Special Agents, upon reporting for duty, are given an intensive thirteen-week period of training prior to actual field assignment. This course includes, among other things, instruction in constitutional law, federal criminal procedures and ethics of law enforcement. The Agents study the rules of evidence and are instructed in searches and seizures, interviews and confessions. The Special Agent learns that he is a servant of the people, a protector of the right of the individual. He develops an *esprit de corps*, a loyalty to doing his job in the right way. The law-trained Special Agent, of course, is enabled to make an excellent contribution to the work of the FBI. I wish to pay tribute to the fine quality of the graduates which America's law schools have sent us. We in the FBI are proud to have them as Special Agents. They are doing an excellent job.

I might mention that in addition to training our own Special Agents, the FBI provides training for local law enforcement officers. In 1935, the FBI National Academy was founded for the purpose of training selected local officers as police instructors and administrators. To date, over 3,800 officers have graduated, representing every state in the Union and many foreign countries. These men, upon returning to their home departments, instruct their brother officers in the fundamentals of good crime detection. We estimate that over 200,000 local officers have benefited from this training. The

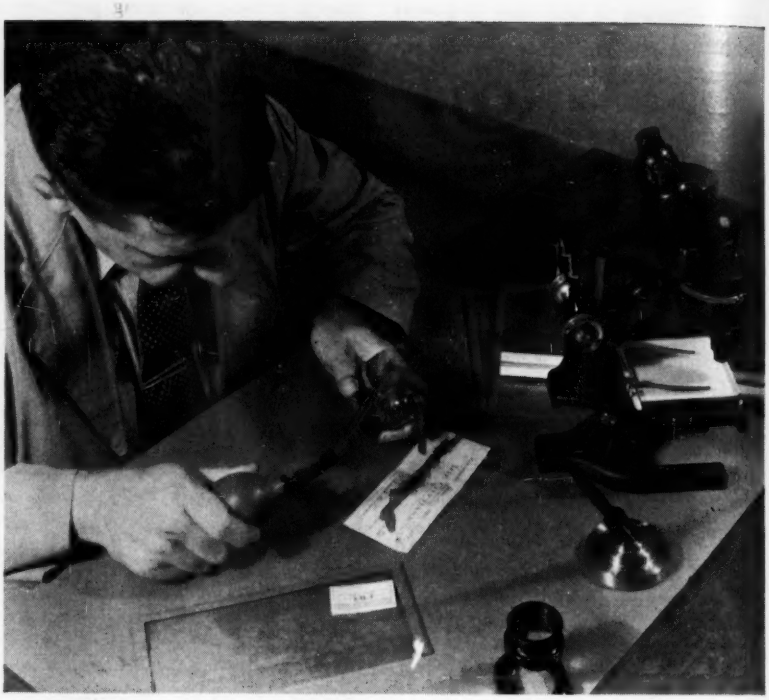
Academy's curriculum includes, among other things, courses designed to promote respect for civil rights. Moreover, the FBI, if requested, will conduct police training schools in local departments. Every effort is made by the FBI to promote higher standards of law enforcement throughout the nation.

Modern Scientific Technique— Better Law Enforcement

Experience has shown that any danger from law enforcement to civil liberties comes not from evil intent, but from law enforcement officers poorly trained, ill-equipped and untutored in the ethics of the profession. Third degree tactics, illegal searches and seizures, unlawful arrests, abusive language and demeanor—these are the acts of the poorly trained officer who lacks the technical know-how of competing with the criminal. In years past, unfortunately, certain areas of American law enforcement utilized bullying, personal mistreatment, illegal arrests and detentions. Admittedly, these nefarious tactics do still occasionally occur. But they are becoming much less frequent. The modern-day officer, learning up-to-date scientific techniques of crime detection, is using skill —not brute force—to achieve his ends. Hence, the vital need today for communities to realize that adequate salaries, equipment, training and, above all, respect for the profession are absolutely necessary. In the final analysis, the protection of civil liberties rests on the attitude of the individual citizen of this nation.

Technical crime detection methods are most vital today in increasing the efficiency of law enforcement. Day after day fingerprints and the scientific laboratory are solving criminal cases. A piece of dirt, a fleck of paint, an old orange peel—these often become the clues to prove guilt or exonerate the innocent. The microscope, the test tube, the spectrograph become the ingredients of the law enforcement officer's skill. He utilizes intelligence, resourcefulness and initiative to solve cases.

During the fiscal year 1959, for example, the FBI Laboratory conducted almost 185,000 scientific examinations of evidence submitted by law enforcement agencies in every state of the Union. The facilities of the FBI Laboratory are available free of charge to any duly constituted law enforcement agency. This means that any police department or sheriff's office in the nation, even though small in size, has available the latest techniques of crime detection to help fight crime. FBI technical experts will examine the evidence submitted and furnish the submitting agency a written report of their findings. Later, if the local case goes to trial, the FBI examiner will testify as to the results of his examination, again without cost to local authorities.



An FBI technician developing obliterated writing on a check through use of iodine fumes

Proving Innocence— A Case in Point

Many times the FBI Laboratory is able to prove innocence. Not long ago, for instance, a book of blank money orders was stolen in a Southern city. Two of the stolen money orders were passed by an individual who identified himself with a driver's license. Local police subsequently arrested a man whose name corresponded to that on the money orders and who lived at the address listed on the driver's license, charging him with the theft and passing of the stolen items. Three eyewitnesses definitely identified the resident as the passer of the money orders, despite his pleas of innocence. The result: a sentence of four years in jail.

While this individual was serving his sentence, more of the stolen money orders were passed. These money orders, along with those previously passed, were sent to the FBI Laboratory for examination. Here, it was determined that the individual serving the prison term had not prepared any of the writing on the stolen money orders! As a result, this person's sentence was completely vacated.

Fingerprints represent another weapon of attack against the criminal. At present the FBI's Identification Division has over 155,000,000 sets of fingerprints on file. They are divided into criminal and civil files, the former representing roughly 20 per cent of the total number. These prints are daily rendering yeoman services to the cause of law enforcement. If a criminal is arrested, for example, the law enforcement agency need only send his fingerprints to the FBI Identification

Division. They are immediately searched through the FBI fingerprint files—which takes only minutes! The submitting agency is expeditiously advised of the results of the check. In this way criminal fugitives are often located. In fact, during 1959 a total of 16,967 criminal fugitives were identified through FBI fingerprint searches. The services of the FBI Identification Division are available without cost to law enforcement agencies throughout the nation.

The FBI is today a service institution on a national level to American law enforcement. To think of the FBI as an isolated, highly secretive and prideful agency on the national level, intent on concentrating power in its own hands, is not to be truthfully informed on American law enforcement today. The FBI is working valiantly to aid local law enforcement on all levels to meet the problems of the day. Crime is a serious menace and all of us in law enforcement must work together. The weapons of attack against the criminal—such as police training, science, fingerprints—must be utilized to the fullest extent. The criminal is exploiting to his own advantage the latest technological developments of society. Law enforcement can do no less. This means that all law enforcement, local, state and national, must work together. This is a basic operating principle of the FBI.

I received a letter some years ago from a local sheriff. He was appreciative of an FBI-conducted police school held in his home town. "This school was very well received in this territory, and I just wanted you to know that we appreciate the efforts of you and the men of your organization in affording training programs for Officers on the State, County, and City level." He pointed out that law enforcement officers are intelligent, sincere and tolerant, but their chief handicap "has been a lack of training and a lack of understanding of the legal processes to which a person arrested is entitled".

This letter, in my opinion, reflects the courageous and wholesome attitude of American law enforcement. These men, wherever they may be, are interested in doing a good job. They want to protect the rights, lives and property of our citizenry. The biggest problem facing them is to secure the working knowledge to do the job. This means that every community must do its share to provide these men with the working tools; as long as the community is niggardly with funds, support and interest, then law enforcement will do a poor job.

An efficient law enforcement, dedicated to the democratic spirit of America, is our best protection against abridgment of our civil liberties. America does not need a national police. Such an organization would be contrary to the democratic traditions of this nation. The answer to the crime problem lies in a strengthening of the present system of fraternal, voluntary and cooperative law enforcement, local, state and national. These agencies can do the job. The FBI is proud to be a part of this system of law enforcement, protecting the liberties of this land of the free.

Special agent counting hits in target after practice with Thompson machine gun on range at United States Department of Justice Building.

The Public Trial and the Free Press

Canon 35 of the Canons of Judicial Ethics forbids the broadcasting or televising of courtroom proceedings and bans the use of cameras in court. Members of the press and representatives of the radio and television industries argue that these restrictions are a violation of freedom of the press. Mr. Justice Douglas answers these critics of the Canon in a lecture delivered under the auspices of the Law School of the University of Colorado on May 10, as the fourth annual address in The John R. Coen Lecture Series.

by William O. Douglas • ***Associate Justice of the Supreme Court of the United States***

THERE IS PRESSURE these days on courts all over the land to put trials and hearings on radio and television. In one state, the radio and T.V. industry leveled its guns at a court which had banned those broadcasts. At fifteen minute intervals there were spot announcements over the air reminding the people that "the courts do not belong to the lawyers" and urging the listeners to get busy and write the members of the court to change the rule.

Others have maintained that "the right to know" is basic in our liberties and therefore the courtrooms, investigative hearings and all like sessions should be photographed and broadcast. Trials and investigations, it is said, have educational values to the general public; and, it is contended, the general public should be admitted so that they better understand the operations of their government. The Sixth Amendment guarantees the accused a "public trial". And so, the argument goes, everyone who can be reached by pictures or by radio or television is included in "the public" about which the Constitution speaks.

The Supreme Court of Colorado in 1956 adopted a report of a referee recommending that trials may be televised or broadcast in the discretion of the trial judge, provided it would not in his judgment "detract from the dignity thereof, distract the witness in giving his testimony, degrade the court, or otherwise materially interfere with the achievement of a fair trial." *In re Hearings Concerning Canon 35*, 296 P. 2d 465, 472.[1]

Photographing or broadcasting of trials in my view imperils the fair trial of which we boast. It is not dangerous because it is new. It is dangerous because of the insidious influences which it puts to work in the administration of justice.

Newspapers, radio and television are in the hands of men who have their own political philosophy and their own ideas as to what justice is and how it should be administered. Some newspapers dominate a community. When ownership of the paper is combined with ownership of the radio and television station, the community may become saturated with one point of view. We have had publishers who were tyrants and sought to impose their will on the courts as well as on the people. This pressure can be serious when judges are elected—as they are in about three-quarters of our states. Even federal judges, who have life tenure, may feel the lash of editorials demanding that cases be decided this way or that.

In Great Britain and in countries like Pakistan, India and Australia that follow British legal procedures, an editor will be hauled up before the court for contempt if he attempts to indicate how a case should be decided, if he dramatizes the trial, or if, pending appeal, he editorializes the case. See *Rex* v. *Bolam*, 93 Sol. J. 220; *King* v. *Parke*, [1903] 2 K. B. 432; *Rex*. v. *Davies*, [1945] K. B. 435. Sparse comment is indeed all that is tolerated.

Freedom of Speech— The Fourteenth Amendment

That kind of issue has consumed many pages in American law reports. We, too, have advocates of the view that the editor who comments on pending litigation risks contempt. We have, however, resolved the question differently from England. After all, we have a written Constitution which includes, in terms that are absolute, a guarantee of freedom of speech and of press. The First Amendment was once applicable only to the Federal Government. But the Fourteenth Amendment made it applicable to the states as well. As the Fourteenth Amendment provides that no state shall deprive a person of "liberty" without "due process of law", the Court eventually held that it incorporates the conception of the freedoms embraced in the First Amendment.

If, as in India, our written Constitution permitted "reasonable" regulation of the press,[2] we might well say that the judicial power includes the punishment of editors who through their papers tried to influence decisions. But

1. *Cf.* Oklahoma's rule, 30 OKLA. B. A. J. 1623-1624. And see *Lyles* v. *State*, 330 P. 2d 734.

2. Section 19(2) of the Indian Constitution permits "reasonable restrictions" on freedom of expression in several situations including "contempt of court".

since our freedom of the press includes no such qualification, we have concluded that a free press has the same dignity as an independent judiciary. *Pennekamp* v. *Florida*, 328 U. S. 331. Judges must be sturdy characters. *Craig* v. *Harney*, 331 U. S. 367, 376. This exposes them to the rough and tumble of American life. The alternative of putting the press under the thumb of judges would be a break with the First Amendment rights. *Bridges* v. *California*, 314 U. S. 252. We have made our choice, refusing to sacrifice freedom of press to the whims of judges. We know that judges as well as editors can be tyrants. See *Nye* v. *United States*, 313 U. S. 33, 48-52.

This is not to say that the influence of newspapers on trials should go unnoticed. At times the papers can help arouse passions in a community so that no trial can be a fair one. The courtroom by our traditions is a quiet place where the search for truth by earnest, dedicated men goes on in a dignified atmosphere. The trials recently held in Cuba at a stadium filled with hooting people are the very antithesis of our conception of fair trials. When the famous Communist trial was being held in New York City, a motion was made to transfer it from the Federal Building to Madison Square Garden so that the crowds could pack in. That motion was denied. Those who sponsored it apparently were interested in making the trial a spectacle. Spectacles, however, do not comport with the quiet dignity and dispassionate search for truth which we associate with judicial proceedings. As John M. Harrison of the *Toledo Blade* put it, "... it never was intended that freedom of the press should give newspapers license to cripple the right of every man to a fair trial". "The Press v. The Courts", *Saturday Review*, October 15, 1955, pages 9, 35.

Public Outcry Can Make a Trial a Mockery

Passion and public outcry, aided and abetted by the press, have at times so possessed a community and its courthouse as to make the trial a mere mockery of justice. When that has happened, a new trial has been granted. *Moore* v. *Dempsey*, 261 U. S. 86. A mistrial was recently declared for that reason in a widely publicized prosecution of Americans charged with attempting to cause insubordination in our Armed Forces in Korea. *United States* v. *Powell*, 171 F. Supp. 202.

At other times the press has been the vehicle for getting into the jury room evidence against the accused which no judge would admit at the trial. Then a new trial has also been granted. *Marshall* v. *United States*, 360 U. S. 310. As the court in *Coppedge* v. *United States*, 272 F. 2d 504, recently noted, a newspaper may properly print what jurors should not know. A defendant, however, is on trial for a specific crime, and is not to be condemned, imprisoned, or executed for what laymen would call his bad character or reputation. See *Michelson* v. *United States*, 335 U. S. 469, 475-476. Rules of evidence are designed to narrow the issues and protect an accused against prejudice. Judges, not newspaper reporters, fashion and supervise those rules.

At other times the papers may so beat the drums of prejudice and passion as to make it doubtful whether a trial in the local courthouse can be fair to a particular defendant. See *Shepherd* v. *Florida*, 341 U. S. 50; *Stroble* v. *California*, 343 U. S. 181, 191-195. Local feelings may run so high as to necessitate a change in venue or a continuance to allow emotions to subside.

The point is that our remedy for excessive comment by the press is not the punishment of editors, but the granting of new trials, changes in venue, or continuances to parties who are prejudiced.

There are, however, activities in which the press should not indulge, lest the intrinsic nature of the trial itself be changed.

The matter of the public trial assumes new proportions these days. To what extent should modern inventions be used to report a trial? Modern inventions can often help in improving the administration of justice. Alaska, for example, has recently substituted electronic recording machines for court reporters at all trials in the state courts. When a tape recording is made of a trial, a record is preserved that has more warmth and emphasis than the cold notes of a reporter. A taped record is indeed a more faithful account of what went on than transcribed notes. Few storms gather around that type of problem. A great controversy, however, concerns the publicity which should be given a trial. Should it be covered by the camera? Should it be transferred to radio or television?

Canon 35 of the American Bar Association's Canons of Judicial Ethics places its weight on the side of the quiet dignity of the courtroom. It reads in part as follows:

> The taking of photographs in the courtroom, during sessions of the court or recess between sessions, and the broadcasting or televising of court proceedings are calculated to detract from the essential dignity of the proceedings, distract the witness in giving his testimony, degrade the court, and create misconceptions with respect thereto in the mind of the public and should not be permitted.

Rule 53 of the Federal Rules of Criminal Procedure was written in the same tradition:

> The taking of photographs in the courtroom during the progress of judicial proceedings or radio broadcasting of judicial proceedings from the courtroom shall not be permitted by the court.

In 1952 a Special Committee of the American Bar Association, headed by the late John W. Davis, reported on the issue of broadcasting or televising trials or legislative investigations:

> To treat trials as mere entertainment, educational or otherwise, is to deprive the court of the dignity which pertains to it and can only impede that serious quest for truth for which all judicial forums are established.
>
> The intrusion into the courtroom of mechanisms which require the participants in a trial consciously to adapt themselves to the demands of recording and reproducing devices, and to measure their time accordingly, distracts attention from the single object of promoting justice. The attention of the court, the jury, lawyers and witnesses should be concentrated upon the trial itself and ought not to be divided with the television or broadcast audience who for the most part have merely the interest of curiosity in the proceedings. It is not difficult

to conceive that all participants may become over-concerned with the impression their actions, rulings or testimony will make on the absent multitude. [77 A. B. A. Rep. (1952) 607, 610.]

There is mounting opposition to that recommendation. The opponents maintain that the concept of a public trial is an expending one to be kept in tune with the times, that trials should be broadcast or televised unless unfairness would result.

A "Public Trial" Is Meant To Benefit the Accused

It is a "public trial" that the Sixth Amendment guarantees. It is a "public trial" that is guaranteed by some state statutes.[3] But this guarantee is for the benefit of the accused, not the press. In *United Press* v. *Valente*, 308 N. Y. 71, Judge Stanley H. Fuld wrote, "As long as the defendant is assured the right to invoke the guarantees provided for his protection, the public interest is safe and secure, and there is neither need nor reason for outsiders to interject themselves into the conduct of the trial." *Id.*, at 81. The concept of the public trial is not that every member of the community should be able to see or hear it. A public trial means one that is open rather than closed—a trial that people other than officials can attend. The public trial exists because of the aversion which liberty-loving people had toward secret trials and proceedings. See *In re Oliver*, 333 U. S. 257, 268. That is the reason our courts are open to the public, not because the Framers wanted to provide the public with recreation or with instruction in the ways of government.

What transpires in the courtroom is, of course, public property in the sense that what happens may be reported and discussed. Yet the historic concept of a public trial envisaged a small close gathering, not a city-wide, state-wide or nation-wide arena.

With all deference to the Supreme Court of Colorado I feel that a trial on radio or television is quite a different affair from a trial before the few people who can find seats in the conventional courtroom. The already great tensions on the witnesses are increased when they know that millions of people watch their every expression, follow each word. The trial is as much of a spectacle as if it were held in the Yankee Stadium or the Roman Coliseum. When televised, it is held in every home across the land. No civilization ever witnessed such a spectacle. The presence and participation of a vast unseen audience creates a strained and tense atmosphere that will not be conducive to the quiet search for truth.

Mobs Are Not Interested in Justice

Photographing a trial with ordinary cameras does not entail those evils. But it spawns evils of its own—evils that have sometimes been summarized under the heading "trial by newsphoto". Picture-taking in the courtroom is more than disconcerting. It does not comport with traditional notions of a fair trial. A man on trial for his life or liberty needs protection from the mob. Mobs are not interested in the administration of justice. They have base appetites to satisfy. Even still pictures may distort a trial, inflame a proceeding by depicting an unimportant miniscule of the whole, or lower the judicial process in public eyes by portraying only the sensational moments.

A state court rule that barred the broadcasting or photographing of trials was sustained when challenged in a federal court, Judge Wallace S. Gourley stating:

> The very thought of members of the press and/or amateur photographers and others employing cameras, no matter how silent and concealed, to photograph different parties and witnesses to a court proceeding while the parties and the court are engrossed in the determination of matters of tremendous moment to the parties involved, is repugnant to the high standard of judicial decorum to which our courts are accustomed, and, indeed, may prove an opening wedge to a gradual deterioration of the judicial process.
>
> [T]he greatest danger to freedom may well stem from those who seek the license and luxury of increased liberties at the expense of the processes which feed life blood to our free institutions. [*Tribune Review Pub. Co.* v. *Thomas*, 153 F. Supp. 486, 494.]

And Judge Herbert F. Goodrich in affirming this judgment, wrote:

Mr. Justice Douglas

> We suppose it would not be contended that a newspaper reporter or any other citizen could insist upon entering another's land without permission to find out something he wanted to know. In the same way merely because someone's private letters might be interesting as gossip or as models of English composition it would hardly be argued that one could open another's desk and read through what he finds there. Could an interested observer insist on the constitutional right to take motion pictures of a private family in and about its household contrary to that family's wishes? We think that this question of getting at what one wants to know, either to inform the public or to satisfy one's individual curiosity is a far cry from the type of freedom of expression, comment, criticism so fully protected by the first and fourteenth amendments of the Constitution. [254 F. 2d 883, 885.]

No spectacle is conducive to the search for truth which every trial involves. The opportunities for men to exploit the situation are greatly multiplied. Prosecutors usually run for office. And nowadays about three-fourths of our states provide for the election of judges, as I have said. Prosecutors and judges—as well as defense counsel—are human; and the temptation to play to the galleries will be stronger than many can resist.

Caleb Foote of the University of Pennsylvania Law School recently reported on a study he made of vagrancy

3. The requirement that proceedings be "public" has at times been extended by statute to administrative proceedings at all levels of state government. See Me. L. 1959, c. 219; Wiggins, FREEDOM OR SECRECY (1956).

in Philadelphia. 104 *U. Pa. L. Rev.* 603. He relates that movies were taken of some of the trials:

> At one of the hearings floodlights were mounted behind the bench and as the defendants were called up one by one, a photographer, crouching just behind the magistrate, took motion pictures of the proceedings. The lights were arranged in such a way that they must have blinded those standing in front of the magistrate; the effect was much like that of a police lineup. [*Id.*, at 607.]

His account of these trials—held when the newspapers were conducting a clean-up campaign—makes very clear that some judges make big plays to the grandstands. A trial that is broadcast or televised creates the opportunity to show the voters how magnanimous the prosecutor is, how just the judge.

While witnesses may be intimidated by the presence of the microphone, others seeking publicity, may exaggerate or clown or make the proceeding a vehicle for getting public attention.

The Dangers of Photography in Court

As one trial lawyer recently said: "It is the fact of photography, the fact that the intrusion is present, the fact that all the principals to the trial—judge, witness, lawyer, jury—are 'on stage' which is inescapably distracting from the task at hand. It is the fact that these participants are made actors which is dangerous and disturbing. If unwilling actors, then their essential dignity as human beings is being violated. If willing actors, then they may be far more dangerous to the life, liberty and property of the litigants because their principal concern will not be compliance with their oath, but with the question of their effectiveness as actors. The manner or method of making them actors is beside the point." Epton, "Controversial Canon 35", *Sooner Magazine*, February, 1960, pages 16, 30.

A comment on Colorado's new rule in 34 *Dicta* 55, 58, adds the following observations:

> Prior to any criminal trial the prosecutor's case will have been fully presented to the public because of the publicity given the preliminary hearing. Public sentiment, usually against an accused person, will have been crystallized. Will not a witness' recollection of the facts in favor of the defendant be colored by the publicity and public sentiment? Again, even if a witness' recollection is unaffected, will not the fact that his testimony is broadcast make him reluctant to fully state the facts in favor of the defendant, in the face of adverse public sentiment?

Back in 1934 the United States Board of Steamboat Inspectors held public hearings over the *Morro Castle* disaster. Those hearings were broadcast on the radio. One witness, putting his lips to the microphone and addressing himself to the unseen audience of the radio world, shouted, "Mom—how am I doing?" Another witness, speaking to the same audience, said, "I hope the red-headed girl and all the other girls and those I met on shipboard will remember me and the pleasant times we had and send me some postal cards." The New York County Lawyers' Association, to its great credit, denounced the broadcast of that investigation and urged that all broadcasts or movies of judicial proceedings or administrative hearings be discontinued "in the interests of justice".

Televising and broadcasting of congressional hearings have been more and more frequent.[4] Then the hearing often becomes a trial in which the entire nation sits as a jury. The people do not, of course, render a verdict; they do not pronounce the witness guilty or not guilty in so many words. Yet the television jury often condemns men. The television trial may produce evidence to convict the witness; and it may so saturate the country with prejudice against an accused that a fair trial may be next to impossible. As stated by Harry W. Jones in 37 A.B.A.J. 392:

> If several million television viewers see and hear a politician, a businessman or a movie actor subjected to searching interrogation, without ever having an opportunity to cross-examine his accusers or offer evidence in his own support, that man will stand convicted, or at least seriously compromised, in the public mind, whatever the later formal findings may be.

This use of television in these inquisitorial procedures puts in jeopardy some of our basic tenets. As stated in the *Temp. L. Q.*, 70, 73: "The entire concept of our criminal law, that a man is innocent until proven guilty beyond a reasonable doubt, is in jeopardy of being replaced by a new concept of guilt based on inquisitorial devices. What is important is that many such witnesses were convicted even though they had not been tried through any judicial processes. There was no way of testing the truth of the statements made or of reasonable implications drawn from the questions asked."

Moreover, commercial sponsorship of such broadcasts can only cheapen or vulgarize processes of government that should be sacrosanct.

In addition, as one lawyer has said, one evil of televising investigations or trials is the tendency to give an "incomplete presentation"—to "carry only the sensational parts of a hearing", or selected portions that "may distort" the presentation or slant it one way or the other. Taylor, "The Issue Is Not TV, But Fair Play," 12 *Fed. Com. B. J.* 10, 14. And see Maslow, "Fair Procedure in Congressional Investigations: A Proposed Code," 54 *Col. L. Rev.* 839, 876-877.

These are some of the reasons behind the observation in *Life* after the Army-McCarthy hearings on television in 1954, "If the hearings have proved anything to date it is that courtroom procedure, with its strict rules on conduct and introducing evidence, is a most marvelous human invention." "The Men McCarthy Made Famous," *Life*, May 17, 1954, page 47.

One shudders to think what could be the result in trials having a political cast—where the accused is unpopular, where the charge is inflammatory.

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4. The Commission on Civil Rights created by the Civil Rights Act of 1957, 71 Stat. 634, 42 U.S.C. §1975, has adopted a rule permitting, within limits, its hearings to be covered by radio and television. The rule provides: "Subject to the physical limitations of the hearing room and consideration of the physical comfort of Commission members, staff, and witnesses, equal and reasonable access for coverage of the hearings shall be provided to the various means of communications, including newspapers, magazines, radio, news reels, and television. However, no witness shall be televised, filmed or photographed during the hearings if he objects on the ground of distraction, harassment, or physical handicap."

Think, too, of the times when a community is thoroughly aroused about some heinous crime—so aroused as to generate an atmosphere in which a fair trial cannot be held. *E.g.*, *People* v. *McKay*, 37 Cal. 2d 792; *State* v. *Weldon*, 91 S. Car. 29; *Moore* v. *Dempsey*, 261 U. S. 86. Imagine what could happen if the latent local passions were loosened in the channels provided by radio and television. Then there might be no place to which the trial could be transferred to protect the accused.

Was it not Juvenal who wrote "Two things only the people anxiously desire —bread and circuses"? This January in Baghdad the government gave the mob a circus in the form of a televised trial of some seventy defendants. The court was the People's Court; the charge was a plot to assassinate Premier Karim el-Kassem. The accused were herded handcuffed into a pen ablaze with klieg lights. A hand-picked studio audience jammed the room. The trial began at 7:00 P.M. to accommodate the television audience. The judge and the prosecutor vied for star billing while the studio audience, true to the clues, shouted and applauded.

It has recently been observed with great discernment that "[m]ass opinion has acquired mounting power in this country. It has shown itself to be a dangerous master of decisions when the stakes are life and death." Lippmann, *The Public Philosophy*, page 20. That was written about public issues on which the vote of the people is final and conclusive. Mass opinion can be even more dangerous in the operation of our legal system. It has no business there. It is anathema to the very conception of a fair trial. It applies standards that have no place in determining the awful decision of guilt or innocence. The courtroom at these times is as sacrosanct as the cathedral, to be guarded against all raucous, impassioned, and foreign influence. The matter was succinctly put by Judge George H. Boldt in 41 A.B.A.J. 55, "Ordeal by publicity is the legitimate great-grandchild of ordeal by fire, water, and battle."

It seems to me no answer to say that the trial judge can keep full control of the situation by denying permission to photograph or broadcast or televise the proceedings where an unfair trial might result. Imagine the pressure that judges standing for election would be under in communities where the dominant paper owns the radio and television station.

In all cases where the trial promised glamour or excitement the pressure for photography and broadcasting would be enormous. Where judges are elected, the temptation to show the electorate how a trial can be masterfully handled would be great. Our judges are honorable people and I do not attribute base motives to them. Yet they are human; and unconscious influences would press heavily on them to open their courtrooms so that the masses could have ringside seats to a spectacle made possible by modern science. And when exceptions are made and the trial opened up to broadcasting and television, the damage done may be too subtle to measure accurately. *Cf. Baltimore Radio Show* v. *Maryland*, 193 Md. 300, 67 A. 2d 497. Since defendants' rights are the interests protected by the public trial the end is best served by banning all photography, broadcasting, and televising. The camel should be kept out of the tent, lest he take it over completely.

I can still see in my mind's eye the beard of Chief Justice Hughes bristle as he reported to the Conference a proposal to broadcast the proceedings before the Court. His reaction was not that of the stodgy conservative opposed to change. His opposition welled up from a deep instinctive impulse to make the courtroom sacrosanct—to keep it a place of dignity where the quest for truth goes on quietly and without fanfare and where utmost precautions are taken to keep all extraneous influences from making themselves felt. He knew from broad experience that procedural safeguards—control of the means used to reach a result—are often as important as the ends themselves.

American Legal Education

In this article, Dean Harno discusses the factors that have contributed to our modern system of law schools in the United States, tracing the development of legal education in this country from the catch-as-catch-can "reading" for the law at the time of the Revolution. His exposition of the educational problems that currently beset the profession indicates that the law schools have a keen appreciation of the problem of fitting the lawyer for his role in society.

by Albert J. Harno • ***Former Dean of the University of Illinois College of Law***

PREPARATION FOR THE practice of law in early American history followed the English prototype. The source material in England was the common law, but the stress was upon the practical aspects of training, and this was the pattern of training in early America. There was, in fact, nothing at that time in either England or America that can be described as a system of legal education. Since then, under the urge and stress of distinctive and divergent forces, legal education in America has established a framework and substance of its own. There remains, notwithstanding, a close and enduring kinship between the English system and our own. This kinship is nurtured by the source materials of study—the common law—shared by students in both countries, by the adherence in both England and America to basic concepts of law which govern individual rights and human relations, by a common language, and by a stimulating interchange of scholars and the contributions of scholars, not only between England and the United States, but between the United States and England, Canada, Australia and New Zealand respectively.

Influence of Blackstone

A marked influence in the evolution of American legal education was fostered by the writings and career of William Blackstone. Blackstone was appointed a lecturer on law at Oxford in 1753 and in 1758 he was made Vinerian professor of law in that university. His lectures were the first ever given on English law in a university. It was while he was lecturing at Oxford that he wrote his famous *Commentaries*.

Two major developments in the area of legal education in America are attributable to Blackstone. The first related to his *Commentaries*. These, written in a thoroughly readable style, gave the first comprehensive account of the English law. The *Commentaries*, for generations, became the principal materials of study, both in England and America, for neophytes preparing for the law. The second trend was stimulated by the example of Blackstone's professorship in a university and his eloquent argument that law ought to be taught in the universities. Blackstone sought to establish "a system of legal education", and in that he failed. Yet his "life-work, and above all his faith in the necessary alliance between law and letters", observed Dicey,[1]

> have in fact been fruitful of memorable results. Failure to create a great school of law in England has been balanced by a triumphant success in the United States... Now—and this is the matter here to be noted—legal education has in the United States been from the beginning influenced by the work and ideas of Blackstone.

One further observation relating to Blackstone and his work merits mention, and particularly in its bearing on the development and scope of legal education. Blackstone's writings were the fruits of his teaching. Teaching and productive scholarship are interrelated. Teaching stimulates productive scholarship and productive scholarship enriches the substance of good teaching. This is commonplace today, but in the history of Anglo-American law, Blackstone was the first to exemplify this interrelation.[2]

Chairs of Law and Early American Law Schools

Preparation for the Bar in early America was, as has been noted, a desultory procedure. The emphasis was on apprenticeship training. There were no college requirements for admission to the practice. Blackstone, in the first chapter of his *Commentaries*, which bore the title "On the Study of Law", eloquently advocated the need for a broad education for all applicants for the Bar. His *Commentaries* were widely read in America. Here the response to his exhortation came forthwith. In 1779, under the stimulation of Thomas Jefferson, a chair of law, with George Wythe as its first incumbent, was founded at William and Mary College. The College of Philadelphia followed in 1790 with the appointment of James

1. *Blackstone's Commentaries*, 4 CAMB. L. J. 286, 300 (1932).

2. The writer discussed this interrelation more fully in Harno, *The Law Schools—Centers of Legal Research and Scholarship*, 12 J. LEGAL ED. 193 (1959).

Wilson, a Justice of the Supreme Court, as professor of law.

In 1793 there occurred another noteworthy event in the history of legal education. Columbia College in that year appointed James Kent to a professorship of law. He held that position until 1797, whereupon there followed for him a distinguished career on the bench and in public affairs. In 1823 he was reappointed to his professorship at Columbia. It was during the years of his second tenure at Columbia that he wrote his famous *Commentaries on American Law*. The late 1700's and the early 1800's witnessed the institution of additional chairs of law in various universities and the founding of the first law schools. Transylvania University established a chair of law in 1799. Henry Clay taught there for two years. Yale followed with a similar appointment in 1810, and the University of Virginia with another in 1826.

Chairs of law are not to be mistaken for schools of law. The chairs of law were individual professorships founded in the several universities mentioned. In 1784, the Litchfield Law School, which bears the distinction of being the first law school in America, was founded. This school had no university affiliation, and in that description it is the prototype of a number of other law schools organized in later years. During the relatively short period of its existence, the Litchfield School established an enviable record. Many of its graduates distinguished themselves at the Bar, on the Bench, and in public life as governors of states, Congressmen and members of the Cabinet; three were members of the Supreme Court.

The Harvard Law School, the first of many law schools with university connections yet to be organized, was established in 1817. "For the first dozen years of its existence", observed Ames,[3] "the Harvard School was a languishing local institution." And then in 1829 Justice Joseph Story was appointed Dane Professor in that school. Story brought to the school the prestige of his name, for he had at the time of his appointment already achieved fame as a jurist, and he brought an infectious enthusiasm for the law. Largely because of him, students went to Harvard from all parts of the United States, and Harvard was soon accepted as a national law school. The trend in legal education owes much to Justice Story. It was because of him, with his magnetic drawing power for students, no less than because of the fact that other law schools were soon to be established, that legal education in America is conducted today in law schools rather than in law offices.[4] While Story was already a famous jurist when he began his teaching at Harvard, he had not yet, beyond his opinions, become a productive scholar. After he began teaching, he wrote and published, in a remarkably short period of time, 1832 to 1843, eight treatises on American law. And again we have an eloquent early example of the interrelation between teaching and productive scholarship.

One more comment on Story's work at Harvard merits mention and this one relates to questions that have been raised as to whether Story's influence in promoting the cause of legal education was wholly salutary. Blackstone, Kent, and other early American legal scholars and teachers of law viewed the law and the study of it as an inseparable part of a liberal education. Under the influence of Story, legal and liberal education at Harvard were divorced, and of liberal education all that remained was the assumption that the student had somehow acquired it. The course of study Story sponsored at Harvard was a strictly professional one, and on this point his views were accepted in legal education in America, and substantially followed to the present time.[5]

Following the Harvard example schools of law were soon established in various universities and the gravitation of the study of law from apprenticeship training to the universities was under way. It must not be taken, however, that this movement was a rapid one. Apprenticeship training was still, and would remain so for years to come, the accepted method of preparation for the profession. In fact, there are today remnants of it in the American system. What is more, there occurred in the forepart of the 1800's a social and political upsurge that reached its crest with the election of Andrew Jackson as President in 1828, which caused a serious obstacle to the advancement of standards for professional education and the stipulation of qualifications for public office. In its broad implications this creed seemed to imply that all male citizens, regardless of education, had the inherent right to practice law. The effect of this popular doctrine was to restrict legal education and to undermine the integrity of the legal system and of the judiciary.

Langdell and the Case Method

A distinctive feature of American legal education is the case method of study and instruction, but the time for this innovation had not yet arrived. Between Story and the advent of Langdell in 1871 there was a lull in the progress of legal education. The number of law schools in the United States increased to twenty-one by 1860 and to thirty-one by 1870. Student attendance in these schools was scant, this notwithstanding the fact that twelve of these schools conducted only one-year courses, that the rest had either one-and-a-half or two-year courses, and that all of them had no entrance requirements. Harvard after 1849 set a requirement that an applicant for admission must be nineteen years of age and be a person of good moral character. During this period young men approached the practice of law through a haze cast by the enervating philosophy of the Jacksonian "democracy". What preparation there was for the Bar was, in the main, through the apprenticeship route.

And then came a cause which provided the sinews for a fighting faith—the case method of instruction—introduced in 1871 by Christopher Columbus Langdell, recently appointed Dean of the Harvard Law School. This was not the first resort to the assignment to students of cases for reading. Various instructors had previously employed

3. *The Vocation of the Law Professor*, in LECTURES ON LEGAL HISTORY, 354, 359 (1913).

4. Dean Griswold, in a recent address, after briefly discussing Story's influence, said, "I think it can fairly be said that he [Story] has had more influence on American legal education than any other person." *English and American Legal Education*, 10 J. LEGAL ED. 429, 432 (1958).

5. Professor Currie has given us a discerning statement on a movement recently initiated which is aimed to liberalize the course of law study toward a closer interrelation between law and the social studies in *The Materials of Law Study*, 3 J. LEGAL ED. 331, 366 (1951).

this system. But the use of cases as an exclusive and all-engrossing method of instruction was initiated by Langdell and credit for the introduction of the "case method" properly goes to him. The case method of instruction did not win the day without a struggle; the battle lines were drawn between those opposed to the Langdell system and Langdell's fighting disciples. Once more the fires of legal education were burning bright. It is unfortunate, with the enthusiasm engendered over this controversy, that the men who were then responsible for shaping the scope and policies of legal education should lay so heavy a stress on a particular method of instruction and that they should project their programs on so confining a conception of the law and its functions.

The adherents of the case method won the day. Langdell's thesis that law is a science; that all the available materials of that science are contained in printed books; and that a legal education must be obtained from the reading of cases selected from those books, was accepted and closely adhered to in legal education for years to come. Thus did Langdell and his followers bring into common use a most stimulating method of teaching, and thus also did they confine legal education in a restricted framework which for years was to dissociate it from the living context of the world about it.

The case system remains the predominant method of instruction in American law schools today, but the original fervor which accompanied it is not now in evidence. No longer is it the all-confining instrument of legal education. The modern casebook bears little resemblance to the early models. Law teachers are aware of the limitations of the system and tend to view it critically, but they remain sensitive to its established values.[6] There is recognition of the fact that there are numerous forces—social, economic and political—at work that contribute, in varying degrees, to the establishment and maintenance of our legal order. Legislation as enacted in the separate states and by the Congress has become a growing factor in the shaping of the legal matrix. In recent years administrative law has come to the fore.[7] In this context judicial decisions interpreting the law, allaying human frictions, and settling controverted issues have an essential and vital part, but gone are the days when there was a single source of the law. What is the impact of these varying forces on legal education? Unquestionably they give rise to many and often conflicting questions with which the lawyer must cope. It is the responsibility of the law schools to prepare their students for the tasks that lie ahead, and this assignment cannot be accomplished through the requirement of case-reading alone.

What is more, in this complex legal system in which we "live and learn", the judicial pronouncements of the judges in the separate states and of the judges in the federal system are often in conflict. On many legal questions there is no single or common view. In this context the emphasis of the law instructor cannot be upon specific rules as embodying "the law", but rather should be on which is the preferable rule, and this involves teaching the student to evaluate conflicting decisions, which is another way of saying, teaching him how to think. As described by Professor Fuller,[8] case instruction is "a method which involves a joint exploration of problems by instructor and class as contrasted with a method designed primarily to convey information from the instructor to the class". Not all instructors are adept at this, but this statement expresses an enlightened view on the objective in the study of cases, and to that end there is no method superior to case instruction.

Legal Education and the Role of the Professor

Legal education cannot, with an understanding of its objectives, be viewed as a subject *sui generis*. It should be evaluated in the setting of a larger and highly significant framework. Over the long years discerning legal educators and high-minded lawyers have been battling side by side for improvements in the scope and content of the course in legal education and for the advancement of the standards and requirements for admission to the study of law and to the Bar. What is the point of this struggle?

Albert J. Harno retired as Dean of the College of Law at the University of Illinois in 1957 after thirty-five years in that post. He is a past President of the Association of American Law Schools and of the Illinois State Bar Association and has written numerous books and articles. He recently accepted the newly created post of Administrator of Illinois Courts and will begin his duties in Springfield in September.

What are the incentives? What are the objectives?

The answers to these questions must be sought through an appraisal of the place and the responsibilities of the legal profession in the context of the social order, and particularly in the structure of the American social order. The objectives of legal education should be appraised within that frame. In this setting, what are perhaps the most apparent contacts of the lawyer are the services he performs as counsellor for his clients. This is a sensitive relationship which demands of the lawyer high skills, ethical conduct, learning and tact. When he appears for his clients in court, the context of his responsibilities broadens. There he must be sensitive, not only to the duties he owes his clients, but also to the duties he owes to his fellow-lawyers, and to the court, and to his responsibilities for the maintenance of the integrity of the administration of justice.

6. Morgan, *The Case Method*, 4 J. LEGAL ED. 379 (1952).

7. Griswold, *English and American Legal Education*, 10 J. LEGAL ED. 429 (1958).

8. *Legal Education and Admissions to the Bar in Pennsylvania*, 25 TEMP. L. Q. 249, 263 (1952).

Underlying the American system (and also the English system) of government is the concept that this is a system of government under law—the adherence by the people to the rule of law. This principle is the foundation upon which our social, religious, economic and public institutions rest. On this base rest also various constitutional structures and legal procedures touching due process of law and involving the concept that every individual, regardless of how unpopular he or his cause may be, is entitled to his day in court, and that legal services be made available to all persons. These are structures built on the basic premise of the rule of law. It follows that this foundation must be kept firm and ever in repair or the superstructures will fall.

What has all this to do with the legal profession and with legal education? This question must be answered in terms of the separate assignments which the public has made to these agencies and entrusted to them for administration. In his relations with his client, the lawyer must carry out his assignments with fidelity and skill, and must be subject to high ethical and moral standards. The judge and the lawyer have the responsibility for maintaining the integrity of the adjudicative process. The lawyer, because of his special training and talents and because of the assignment entrusted to him by the public, has the responsibility to concern himself with the improvement and reform of the law. With him and the judge rests the obligation of securing legal services for all individuals, including those who are without means to pay for these services. The judge and the lawyer have the responsibility for maintaining the due process provision. As stated by the Joint Conference on Professional Responsibility established by the American Bar Association and the Association of American Law Schools,[9]

> One who undertakes the practice of a profession cannot rest content with the faithful discharge of duties assigned to him by others. His work must find its direction within a larger frame. All that he does must evidence a dedication not merely to a specific assignment, but to the enduring ideals of his vocation. Only such a dedication will enable him to reconcile fidelity to those he serves with an equal fidelity to an office that must at all times rise above the involvements of immediate interest.

Broadly viewed, it is the responsibility of the law schools to present as recruits for the profession only those individuals who have demonstrated their fitness to assume the tasks and responsibilities required of members of the profession. More specifically, it is the responsibility of the law schools to admit to the study of law only those individuals who have by their previous education and by their demonstrated aptitudes shown themselves qualified for the study of law; to educate their students in the learning and skills of the law; and to open the windows of vision and perspective for them on the obligations and ideals of the profession.

While the legal profession in America has ever had, with the possible exception of the Colonial period, members who spoke with clarity and insight on the subjects of legal education and the obligations of the profession, the attitude of the profession generally in early America was apathetic. It is no wonder that the cause of legal education did not flourish in that climate and that standards for admission to the Bar were near nonexistent. Except for a clarion voice heard now and then, there was no sense of professional responsibility. In that context, it must be apparent that the evaluations on professional responsibility such as those made above were mere goals, and indistinct ones at that. The outlines of these goals were to be defined and placed in relief only after years of debate and strife that lay ahead.

In 1878 the American Bar Association was organized. It is significant that among the standing committees named in the Constitution of the Association adopted at that meeting was one on *Legal Education and Admissions to the Bar*,[10] and that in the first report of the committee, it stressed the importance of law school training.[11] Subsequently, the committee made reports to the Association at each of the Annual Meetings. On occasion resolutions were offered. In 1891, after presenting an extended factual statement on the status and progress of legal education, the committee made an impressive plea for improvements. "If the profession is now careless of the subject", warned the committee,[12] "and looks upon education for the Bar as a matter that only interests the beginner and his teachers, this sentiment is the most convincing proof of its blindness to its own defects and to the close connection between these and the defects of the law schools." The Association demonstrated its blindness by paying little attention to this report, and the resolutions proposed by the Committee were not voted on by the Association.

In 1892 the Committee was more fortunate. Among the resolutions offered to and adopted by the Association were the following:[13]

> That the American Bar Association strongly recommend that the power of admitting members to the Bar, and the supervision of their professional conduct, be in each State lodged in the highest courts of the State . . .
>
> That in the opinion of this Association, it is a part of the highest duty and interest of every civilized State to make provisions when necessary for the maintenance of law schools, and the thorough professional education of all who are admitted to practice law.

The following year, the Association took a momentous step, both in the interests of the internal administration of the Association and of legal education. It established the Section of Legal Education.[14] The purpose was to create a forum within the Association to which a substantial measure of autonomy could be delegated. Thus, the first section of the Association came into being.

Over the years one of the most heated arguments voiced within the Association against moves to strengthen the standards of legal education and

9. *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A.J. 1159 (1958).

10. 1 A.B.A.Rep. 16 (1878).

11. 2 A.B.A.Rep. 209, 216 (1879).

12. 14 A.B.A.Rep. 301, 320-321 (1891).

13. 15 A.B.A.Rep. 8-20 (1892).

14. 16 A.B.A.Rep. 7-10 (1893). Dean R. N. Sullivan has given an excellent account of the contributions of the American Bar Association and of the Association of American Law Schools to legal education in his report to the Survey of the Legal Profession in *Professional Associations and Legal Education*, 4 J. Legal Ed. 461 (1952).

of admission to the Bar related to the "poor boy". It came to be known as the "John Marshall" and again, as the "Abraham Lincoln" argument. In 1880, when resolutions for the improvement of standards were before the Association, various members spoke in opposition and among them Hinkley, of Maryland. "There are men in this country", said he,[15] "who may not be able to pay for a law school education, who yet may be ornaments to their profession in the future. For this reason I think no resolution ought to be adopted by this body looking to a diploma as an essential qualification." In 1895 Justice David J. Brewer was one of the principal speakers at the annual meeting. His subject was "A Better Education the Great Need of the Profession". He stressed the leadership of the lawyer in public affairs, and the role the lawyer should play in law improvement. If the lawyer is to measure up to these responsibilities, he emphasized,[16] he "must be fitted to lead ... If our profession", he continued, "is to maintain its prominence, if it is going to continue the great profession, that which leads and directs the movements of society, a longer course of preparatory study must be required. A better education is the great need and the most important reform."

His reply to the "John Marshall" and "Abraham Lincoln" argument was forthright. "It is said", he observed,[17]

> that some of the noblest of our members would be shut out from the law and turned into other pursuits. If a four years' course of study had been required, would Abraham Lincoln have become a lawyer? My reply is twofold. First ... Obstacles only stimulate the efforts of such men. Secondly ... The general level of professional standing should not be lowered for fear some single chieftain is never found.

In 1900 the Association of American Law Schools was organized.[18] It came into being as the result of the report and action of a committee of the Section of Legal Education appointed to consider, "What action, if any, shall be taken to bring the reputable law schools of the country into closer relations with each other and with the Section of Legal Education."[19] Thus, a new and independent agency working for the cause of legal education came into being. The Association of American Law Schools, ever since its inception, has been a cogent force working for the advancement of the standards of legal education and the improvement of the substance and content of the educational program. While it and the Section of Legal Education are, in organization, independent of each other, there has been a close affinity of interest and objectives between them, and they have worked together cooperatively and with mutual understanding.

One of the brightest spots in the history of legal education was in the years 1920-1922. In 1920 the Section, the name of which had been changed to the "Section of Legal Education and Admissions to the Bar", elected Elihu Root its chairman. Root had been President of the American Bar Association in 1916. For the President's address he chose the topic, "Public Service by the Bar", and devoted a substantial part of it to legal education and admission to the Bar. It was a noteworthy presentation. He stressed the public responsibility of lawyers. If the profession is to meet its public obligations, he contended, it must have better educated lawyers. To that end he proposed the adoption of measures which would screen from admission to the Bar incompetent and poorly prepared individuals. "No one", said he,[20]

> can help sympathizing with the idea that every ambitious young American should have an opportunity to win fame and fortune. But that should not be the controlling consideration here. The controlling consideration should be the public service, and the right to win the rewards of the profession should be conditioned upon fitness to render the public service.

In 1921, under the stimulation of Root's leadership, far-reaching measures on legal education were approved by the Section and forthwith also approved by the American Bar Association.[21] These resolutions included requisites that all candidates for the Bar be graduates of approved law schools having admission requirements of at least two years of college work; that the law schools must conduct three-year courses of study, have adequate law libraries, and have full-time teachers sufficient in number to insure personal acquaintance on their part with the students. The resolutions outlined a plan for the inspection, under the direction of the Council of the Section, of all law schools. To encourage the cooperation and the acceptance of these resolutions by state and local bar associations, one of the resolutions called for a conference of bar association delegates for the following year.

Here was a major accomplishment. These were not mere resolutions; they projected an ongoing campaign for the improvement of legal education and for raising the standards of bar admission. The results have been immeasurable. These resolutions provided a long-range plan, a *modus operandi* for the improvement of legal education and the advancement of standards for the admission to the Bar under which these causes have continued to be advanced to the present day.

Invitations to state and local bar associations to send representatives to the Conference were issued forthwith. In February, 1922, the Conference of Bar Association Delegates met in Washington, D. C., to consider and take action on the resolutions approved by the American Bar Association.[22] At the end of two days of heated debate the Conference approved the resolutions. Again, Elihu Root was the key figure but he had, at this meeting, the articulate support of many of the leaders of the Bench and Bar of that day. Among the individuals who spoke in favor of the resolutions were Chief Justice Taft, John W. Davis, Herbert S. Hadley, William G. McAdoo, George Wharton Pepper, Elihu Root, Silas Strawn, George W. Wickersham and Samuel Williston. Since the momentous events of 1921 and 1922, legal education has made steady, though often only minimal, progress.

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15. 3 A.B.A.REP. 42 (1880).
16. 18 A.B.A.REP. 450 (1895).
17. *Ibid.*, 453.
18. 23 A.B.A.REP. 447, 569-575 (1900).
19. 22 A.B.A. REP. 565 (1899).
20. 41 A.B.A. REP. 355, 362 (1916).
21. 46 A.B.A. REP. 679, 687-688 (1921). An excellent appraisal of this action and of other highlights in legal education may be found in the address of Ross L. Malone. *Our First Responsibility: The President's Annual Address*, 45 A.B.A.J. 1023 (1959).
22. 47 A.B.A.REP. 482 (1922).

Criticisms of and Progress in Legal Education in Recent Years

In the last thirty-five years, and more particularly since World War II, there has been much activity in the law schools by way of experimentation on the content of the law program and on methods of teaching. Some of these experiments have already demonstrated enduring values. Others, no doubt, are transient, but what is noteworthy is that teachers are willing to undertake them. Criticisms of legal education—may it ever be so—continue to be voiced but the emphasis in some of them has shifted.

The case system still draws fire. The major criticism of past years, when cases were used as the sole source materials of study, is no longer valid, but there is point in current criticisms that the schools still rely too heavily on cases for teaching materials, and particularly, since there is a waning interest on the part of students in case study after the first year of their law course, that there is too much stress on cases in the advanced years of the course.

Prelegal education remains in the doldrums. Progress was made when college work was specified as a requirement for law study. Since the adoption of the requirement of two years of college study in 1921, both the American Bar Association and the Association of American Law Schools have advanced the admission standard to three years of college work, and the indications are that this requirement will soon be increased to a college degree. A substantial number of law schools now require a degree for admission. Some schools have supplemented the requirement of three years of college work for entrance with a quality-grade requirement. But nothing is specified on the content of the college work.[23] Relative to the substance of the prelegal work taken by applicants, there have been no moves to synthesize it with the law program. The view is expressed that the law schools should not regiment the students' college program, and there is merit in this contention. But the fact is that many applicants entering upon their law studies are deficient in the use of English and have had no background in college disciplines that are related to law.[24] It would seem, without resorting to a specification of the courses that must be taken in the prelaw program, that the schools might require of all applicants, as conditions of admission to law school, demonstrated aptitudes or skill in the use of English and a substantive understanding of selected subjects in the social studies.

In the distribution of the courses in the law programs, there is a tendency in the schools to view each course in isolation from all the others. The criticism here is that there is a want of synthesis, not only between related disciplines and the law, but also among the various courses offered in the law program. This criticism gains emphasis from the fact that we are living in an era of social and economic change in which new skills and new perspectives are constantly demanded of lawyers.[25] In short, the criticism is that the schools, in shaping the emphasis and content of their programs of instruction, are neglecting the "big picture" and thus are failing to develop the versatility of approach which the ever-changing social, economic and legal scene requires. On the brighter side it is to be noted that the schools are sensitive to this problem and various experimental courses are in the process of development to meet this criticism.

The unapproved law schools remain an impediment to the progress of legal education. These are schools not approved by the standardizing agencies,[26] which, notwithstanding, under state authority in a number of states, are permitted to exist and to furnish recruits for the profession in the respective states in which they are located.

The most vocal criticism against legal education is that it is not practical enough; that the schools do not adequately prepare students in the practical skills that will be required of them in the practice.[27] Here again we should observe that the schools are seeking to solve this problem.[28] Also, a word of caution should be injected here. Legal education, broadly viewed, is for the lawyer a lifetime undertaking, and not merely a period restricted to three years of law school study. The question is, what part of a lawyer's education, in view of the various sources from which he draws his training, are the schools best fitted to give him? This question is not to be taken to imply that the schools should not seek to develop professional skills in their students. They should make every effort to do so. The point is that they should not undertake to do that which they are ill-fitted to do, and which some other instrumentality of education (*e.g.*, the law office) may be better qualified to do, at the expense of education which the schools are better fitted to give than any other instrumentality.[29]

What is, perhaps, the most serious censure directed against the law schools is that they do not instill in their students a sense of professional responsibility; that too often their graduates enter the profession without an understanding of and perspective on professional standards and the reasons that underlie them. In short, the criticism is that the schools do little or nothing toward sensitizing their students to the enduring ideals and moral and ethical standards of the profession and to the responsibilities, both public and private, that are inherent in the practice.[30]

A generation ago, the answer to this indictment would have been "guilty" or, perhaps, "*nolo contendere*". Even today the schools have not made much progress toward meeting this censure.

23. Vanderbilt, *A Report on Prelegal Education*, 25 N.Y.U. L. Rev. 199 (1950).

24. Many law schools have in recent years introduced courses in legal writing. It is unfortunate that they feel compelled to use valuable law school time to develop a skill that should have been developed earlier.

25. Griswold, *The Future of Legal Education*, 5 J. Legal Ed. 438 (1953).

26. The American Bar Association and the Association of American Law Schools.

27. Frank, *Both Ends Against the Middle*, 100 U. Pa. L. Rev. 20 (1951); Cantrall, *Law Schools and the Layman: Is Legal Education Doing its Job?*, 30 A.B.A.J. 907 (1952).

28. See: Johnstone, *Law School Legal Aid Clinics*, 3 J. Legal Ed. 533 (1951); Bradway, *The Second Mile for Legal Aid Clinics*, 1952 Wash. U. L. Q. 165; Stason, *Legal Education: Postgraduate Internship*, 39 A.B.A.J. 463 (1953); Kessler, *Clerkship as a Means of Skill-Training*, 11 J. Legal Ed. 482 (1959).

29. Stone, *The Function of the American University Law School*, Handbook, Assn. Am. L. Schools. 59 (1911).

30. Cheatham, *The Inculcation of Professional Standards and the Functions of the Lawyer*, 21 Tenn. L. Rev. 812 (1951); McCoy, *Teaching Professional Responsibility*, 5 J. Legal Ed. 202 (1953).

but now the encouraging fact is that many law teachers are sensitive to its implications. The discussions of a *Conference on the Education of Lawyers for Their Public Responsibilities, 1956*,[31] bear strong evidence on how difficult a task it is to reach a solution on this problem, and they also bear evidence on the devotion of some of our foremost law teachers to the assignment of developing an educational *modus operandi* in this area.

A pertinent observation on the law schools of today is that they are enveloped in an atmosphere of activity and experimentation.[32] This goes all the way from testing new materials or combinations of materials for teaching, and new methods of teaching, to the development of research programs and the sponsoring of measures of law reform.

A few typical examples of experiments, in addition to those previously mentioned, on teaching methods and course materials now in progress are the following: Programs on legal writing for beginning law students have been developed in many schools. Some schools follow the beginning course with other courses in the advanced years involving research and the writing of legal memoranda. Excellent use is being made in many schools of the seminar method of teaching. Another approach to the improvement of the over-all instruments of teaching is through the problem method. Experiments are being conducted in the use of films.[33] Courses are being consolidated both to conserve time and to bring related materials into better context.[34] There are broad experiments involving both the testing of teaching materials and research in the area of law in its relation to the behavioral sciences.[35] A course that has much promise is now in process of development by Professors Hart and Sacks of Harvard. The design of the course is to interrelate for the student the range of questions that occur as he considers the legal system as a whole.

Continuing legal education, that is, education for lawyers after law school, has in the last decade become a vital program by the profession.[36] In this movement the law schools have had an important part. Further, during the last decade the Survey of the Legal Profession was made. And again, in this undertaking, law teachers had a prominent part in portraying the role of legal education in the context of the profession and identifying it as a basic concern of the profession. In the evolution of legal education, tribute should also be paid to the law reviews—first, as to the part they have had in the education of students, and second, in a wider frame, in recognition of the influence the leading articles edited and printed by the reviews have had toward furthering the clarification of the law, and in breaking paths for law reform.

A consummate achievement in legal education is that the law schools have become the nation's centers of legal scholarship and research.[37] Various factors have contributed to bringing this about. Mention has been made of the fact that teaching stimulates research. But research would be impossible if the teachers did not have the materials with which to work. Most leading law schools have excellent libraries,[38] and many of the smaller approved schools have good working libraries. "Judges and advocates may not relish the admission", wrote Justice Cardozo nearly thirty years ago,[39] "but the sobering truth is that leadership in the march of legal thought has been passing in our day from the benches of the courts to the chairs of the universities." Today, the teachers of law, through published articles, texts and treatises, and through their services, often performed as public appointees and as members of committees of the organized Bar, in the drafting of legislation, are leading the way in law clarification and reform. "The law teacher", stressed Judge Goodrich,[40] "is the accepted scholarly author of today. . . The [American Law] Institute could not operate without him." In an era in which there is a growing sense of responsibility for law reform on the part of the profession, the assignment of the task of projecting measures bearing on law clarification and reform to law teachers is a high tribute not only to the teachers but also to legal education.

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31. Stone, *Legal Education and Public Responsibility* (1959). See also, *Continuing Legal Education for Professional Competence and Responsibility* (1958). Mention should also be made of the fact that a committee of the Association of American Law Schools, under the chairmanship of Professor Bradway, is busily engaged in gathering materials for a book of selected readings on professional responsibility.

32. Cribbet, *The Evolving Curriculum—A Decade of Curriculum Change at the University of Illinois*, 11 J. LEGAL ED. 227 (1958).

33. Ruud, *The Townes Hall Film Forum*, 11 J. LEGAL ED. 551 (1959). Professor Ruud cites a number of other articles on the role of films in legal education.

34. MacChesney, *The Teaching of International Law and Conflicts as One Course*, 11 J. LEGAL ED. 55 (1958).

35. Watson, *The Law and Behavioral Science Project at the University of Pennsylvania*, 11 J. LEGAL ED. 73 (1958); Sacks, *Human-Relations Training for Law Students and Lawyers*, 11 J. LEGAL ED. 316 (1959); Donnelly, *Some Comments Upon the Law and Behavioral Science Program at Yale*, 12 J. LEGAL ED. 83 (1959).

36. *Continuing Legal Education for Professional Competence and Responsibility* (1959).

37. Harno, *The Law Schools—Centers of Legal Research and Scholarship*, 12 J. LEGAL ED. 193 (1959).

38. See a good discussion on the contributions and problems of the law library, Roalfe, *The Law School Library—Facts and Fancies*, 11 J. LEGAL ED. 346 (1959).

39. Introduction to SELECTED READINGS ON THE LAW OF CONTRACTS ix (1931).

40. *The Role of the Law School in Democratic Society*, 1956 U. ILL. L. F. 253, 259.

United States Policy Regarding International Compulsory Adjudication

In 1946, the Senate ratified the Statute of the International Court of Justice, accepting for the United States compulsory jurisdiction of the World Court. The Senate added a clause excepting disputes which are essentially within the domestic jurisdiction of the United States "as determined by the United States of America". The wisdom of this provision is the subject of a growing debate in the public press. Miss Finch points out that the Connally Reservation is really not new, but is a continuation of long-established American policy.

by Eleanor H. Finch • *of the District of Columbia Bar*

IT IS A GENERALLY accepted principle that when jurisdiction is conferred by international agreement upon an international tribunal to decide a particular dispute or certain categories of disputes between nations, and there arises between the parties to a dispute a disagreement as to the jurisdiction of the tribunal over such dispute, the tribunal shall decide as to its own competence. It is also a generally recognized rule that in deciding upon its competence in such a case a tribunal shall look to the instrument which conferred jurisdiction upon it. Reliance is placed upon Article 36, paragraph 6, of the Statute of the International Court of Justice in arguing that the United States' reservation of domestic questions as determined by the United States cannot deprive the court of the competence to determine its own jurisdiction as provided in that clause of the statute. From an examination of the discussion of the Statute of the Permanent Court of International Justice, upon which the statute of the present International Court is based, and of the United States' declaration of acceptance of the compulsory jurisdiction of the International Court, it appears to have been generally agreed that the instrument which confers compulsory jurisdiction on the court is the declaration of acceptance by the party states. The competence of the court, including the competence to define its own jurisdiction, is therefore limited to the jurisdiction which has been accepted under the declarations of the adhering states.

The point at issue in the current debate on the so-called Connally Reservation by which the United States has excepted from the jurisdiction of the court "disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America", is whether the United States or the International Court should determine that a matter in dispute between the United States and another state is essentially within the domestic jurisdiction of the United States and hence not subject to adjudication by the court. It is not seriously questioned that the intent of the United States Senate in attaching the Connally Reservation to the United States' acceptance of the court's compulsory jurisdiction was to retain for the United States the final determination as to whether a dispute involving matters within its domestic jurisdiction should be submitted for international adjudication.

The Committee on Peace and Law through United Nations of the American Bar Association, in its report to the Association in 1947, stated:

> . . . your committee does not suggest that the Connally Amendment, in adding the words "as determined by the United States" . . . violates the Charter or the Statute, or is beyond the right of a state in depositing its Declaration. When a dispute involving the United States arises, it still would be for the Court to decide whether the issues are within the obligatory jurisdiction accepted by the American Declaration. The Court would undoubtedly have to say that no jurisdiction exists where the United States, or the other party to the dispute, itself determines and announces that the matter is within its domestic jurisdiction.[1]

Moreover, Charles DeVisscher, a former Judge of the Permanent Court of International Justice and of the International Court of Justice, writing on the *Interhandel* case before the International Court, has stated:

> There is no doubt as to the prime

1. 72 A.B.A. REP. 429 (1947).

importance of the automatic reservation in the framework of the declaration made by the United States. The debates in the Senate indeed show that the question of the conformity of the reservation with the Statute was clearly present in the minds of the members of Congress and that it even dominated the discussion. On the other hand, examination of the precedents establishes the fact that the automatic reservation is only one of the manifestations of the consistent determination of the United States to reserve to itself the power to make the ultimate determination as to its obligations with regard to treaties of general obligation for arbitral or judicial settlement. Before such a persistent affirmation of freedom of action, the Court, whose competence is based exclusively upon the consent of the defending state, can only respect an essential condition of this consent and give it its full effect.

Two consequences result from these premises. First of all, there can be no question of the Court, in the presence of a reservation of such a clearly subjective character, assuming to itself the power of determining whether the use made of it in a given case accords with reason or good faith. The terms of the reservation as well as the persistent insistence of the United States upon its right of unilateral decision in the matter of obligatory settlement of disputes give this right an absolute character the exercise of which is not subject to the control of the Court. To interpret the reservation as implying that the determination of its national competence by the United States must be "reasonable" or "made in good faith" is to submit to the Court something that the reservation was precisely intended to remove from its jurisdiction.

* * *

It appears to us to be established that the reservation has been very deliberately adopted by the United States as an essential condition of its declaration, without which the latter would not have been made. To detach this reservation from the declaration and retain the rest of it could lead to holding the United States bound by an acceptance different from what it had undertaken, and, contrary to the principle that the consent of the interested governments is the foundation of all obligatory jurisdiction, to submit it to a jurisdiction which it intended to exclude.[2]

Ample Precedent for the Connally Reservation

The question of retaining the Connally Reservation is therefore one of policy for which there is ample precedent. In an article in the January, 1960, issue of the *American Bar Association Journal*, Professor Louis B. Sohn has stated with regard to the reservation that "There was no precedent for this reservation at the time it was made, but it has now been copied by several states, thus causing a general devaluation of the idea of compulsory jurisdiction."

Although such a reservation had no precedent as far as the Statute of the present International Court of Justice is concerned, it actually represents in substance the consistently maintained policy of the United States with regard to compulsory adjudication of international disputes—a policy which it has followed from the earliest days of its existence. That policy has been that no dispute should be submitted to adjudication except by special agreement made by and with the advice and consent of the Senate, and that matters of vital national interest should be excluded from the scope of general treaties of arbitration or adjudication. In an article in the January issue of the *American Journal of International Law*, 1958, Professor Sidney B. Jacoby made the following statement:

> The contention seems to be made that prior to the Connally Reservation the United States did not claim the right unilaterally to invoke a domestic jurisdiction reservation. But such a right has always been claimed by the United States.
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> * * *
>
> The policy of unilaterally determining a domestic jurisdiction exception was not novel when the so-called Connally Amendment inserted it into the United States' acceptance of the jurisdiction of the International Court of Justice in 1946. The Swiss Government itself so recognized . . . in its message concerning the ratification of the Treaty of February 16, 1931 . . .

Mr. Jacoby then quotes the statement of the Swiss Government relative to the exception of questions of exclusive domestic jurisdiction from the scope of the Arbitration and Conciliation Treaty of 1931 between the United States and Switzerland.[3]

It may be of interest to recall that on January 27, 1926, the United States Senate adopted a resolution (S. Res. 5, 69th Cong., 1st Sess.) advising and consenting to the adherence by the United States to the Protocol of Signature of the Statute of the Permanent Court of International Justice (without accepting or agreeing to the optional clause for compulsory jurisdiction), with certain conditions attached, and containing these further provisions:

> *Resolved further*, As a part of this act of ratification that the United States approve the protocol and statute hereinabove mentioned, with the understanding that recourse to the Permanent Court of International Justice for the settlement of differences between the United States and any other State or States can be had only by agreement thereto through general or special treaties concluded between the parties in dispute; and
>
> *Resolved further*, That adherence to the said protocol and statute hereby approved shall not be so construed as to require the United States to depart from its traditional policy of not intruding upon, interfering with, or entangling itself in the political questions of policy or internal administration of any foreign State; nor shall adherence to the said protocol and statute be construed to imply a relinquishment by the United States of its traditional

Eleanor H. Finch has been Executive Secretary of the American Society of International Law since 1948. A native of Washington, D. C., she attended Trinity College (A.B. 1929) and George Washington University Law School (LL.B. 1932).

2. Translation by the writer from an article in 63 Revue General de Droit International Public 413, at 418-419 (1959).

3. 52 A.J.I.L. 107 at 110-111 (1958).

attitude toward purely American questions.[4]

The Protocol of Accession by the United States to the Statute of the Permanent Court of International Justice, which was drawn up in Geneva in 1929 to meet the Senate conditions to United States' adherence, was submitted in 1932 to the Senate, along with the Protocols of Signature and of Revision of the Statute, in a report from the Foreign Relations Committee (S. Rep. 758, 72d Cong., 1st Sess.) with the same reservations in the proposed resolutions consenting to adherence as those quoted above.[5] The question was not considered by the full Senate until 1935, when another resolution of adherence to the Court was introduced and the same provisos again attached to it.[6] The resolution failed to receive the necessary two-thirds vote of the Senate.[7]

Reservation Is in Line With U. S. Policy

The Connally Reservation represents in succinct form the consistent policy of the United States as laid down by the Senate. The proposal to withdraw the reservation is essentially one to alter radically the United States' position on the subject. As an indication of the virtually unchanged policy of the United States, the provisions of a number of its arbitration treaties may be cited.

The Arbitration Convention of 1908 with Great Britain[8] contains the following provisions:

> Article I
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> Differences which may arise of a legal nature or relating to the interpretation of treaties existing between the two Contracting Parties and which it may not have been possible to settle by diplomacy, shall be referred to the Permanent Court of Arbitration established at The Hague by the Convention of the 29th of July, 1899, provided, nevertheless, that they do not affect the vital interests, the independence, or the honor of the two Contracting States, and do not concern the interests of third Parties.
>
> Article II
>
> In each individual case the High Contracting Parties, before appealing to the Permanent Court of Arbitration, shall conclude a special Agreement defining clearly the matter in dispute, the scope of the powers of the Arbitrators, and the periods to be fixed for the formation of the Arbitral Tribunal and the several stages of the procedure. It is understood that such special agreements on the part of the United States will be made by the President of the United States, by and with the advice and consent of the Senate thereof . . .
>
> Such Agreements shall be binding only when confirmed by the two Governments by an Exchange of Notes.

The Arbitration Treaty of 1928 with France[9] provides:

> Article II
>
> All differences relating to international matters in which the high contracting parties are concerned by virtue of a claim of right made by one against the other under treaty or otherwise, which it has not been possible to adjust by diplomacy, which have not been adjusted as a result of reference to the above-mentioned Permanent International Commission [of investigation and report], and which are justiciable in the nature by reason of being susceptible of decision by the application of the principles of law or equity, shall be submitted to the Permanent Court of Arbitration established at The Hague . . . or to some other competent tribunal, as shall be decided in each case by special agreement, which special agreement shall provide for the organization of such tribunal if necessary, define its powers, state the question or questions at issue, and settle the terms of reference.
>
> The special agreement in each case shall be made on the part of the United States of America by the President of the United States of America by and with the advice and consent of the Senate thereof. . .
>
> Article III
>
> The provisions of this treaty shall not be invoked in respect of any dispute the subject matter of which
>
> (a) is within the domestic jurisdiction of either of the high contracting parties,
>
> (b) involves the interests of third parties,
>
> (c) depends upon or involves the maintenance of the traditional attitude of the United States concerning American questions, commonly described as the Monroe Doctrine,
>
> (d) depends upon or involves the observance of the obligations of France in accordance with the covenant of the League of Nations.

The Treaty of Arbitration and Conciliation with Switzerland, 1931,[10] referred to above, provides:

> Article V
>
> The Contracting Parties bind themselves to submit to arbitration every difference which may have arisen or may arise between them by virtue of a claim of right, which is juridical in its nature, provided that it has not been possible to adjust such difference by diplomacy and it has not in fact been adjusted as a result of reference to the Permanent Commission of Conciliation constituted pursuant to Articles II and III of this Treaty.
>
> Article VI
>
> The provisions of Article V shall not be invoked in respect of any difference the subject matter of which
>
> (a) is within the domestic jurisdiction of either of the Contracting Parties. . .

The issue involved in the Senate action on the unratified Taft treaties of 1911 is peculiarly apropos of the present discussion of the Connally Reservation. The Treaty of Arbitration of 1911 with Great Britain (Conf. Exec. H, 62d Cong., 1st Sess.)[11] provided in Article I:

> All differences hereafter arising between the high contracting parties, which it has not been possible to adjust by diplomacy, relating to international matters in which the high contracting parties are concerned by virtue of a claim of right made by one against the other under treaty or otherwise, and which are justiciable in their nature by reason of being susceptible of decision by the application of the principles of law or equity, shall be submitted to the Permanent Court of Arbitration established at The Hague by the Convention of October 18, 1907, or to some other arbitral tribunal as may be decided in each case by special agreement, which special agreement shall provide for the organization of such tribunal if necessary, define the scope of the powers of the arbitrators, the question or questions at issue, and settle the terms of reference and the procedure thereunder.

4. 20 A.J.I.L. Supp. 73, 74 (1926).
5. See Hudson, *The World Court Protocols before the United States Senate*, 26 A.J.I.L. 569 (1932).
6. See 79 Cong. Rec. 425, 916, 1196, 1205; Hudson, *The United States Senate and the World Court*, 29 A.J.I.L. 301 (1935).
7. *Ibid.* 304.
8. 1 Malloy, Treaties 814; 2 A.J.I.L. Supp. 299 (1908).
9. U. S. Treaty Series, No. 785; 46 Stat. 2269; 22 A.J.I.L. Supp. 37, 38 (1928).
10. U. S. Treaty Series, No. 844.
11. 5 A.J.I.L. Supp. 253, 254 (1911).

This article also provided that the special agreement in each case should be made on the part of the United States by the President of the United States by and with the advice and consent of the Senate, and should be confirmed by the parties through an exchange of notes.

Under Article II of the Treaty the parties agreed:

> . . . to institute as occasion arises . . . a joint high commission of inquiry to which, upon the request of either party, shall be referred for impartial and conscientious investigation any controversy between the parties within the scope of Article I, before such controversy has been submitted to arbitration, and also any other controversy hereafter arising between them even if they are not agreed that it falls within the scope of Article I; provided, however, that such reference may be postponed until the expiration of one year after the date of the formal request therefor, in order to afford an opportunity for diplomatic discussion and adjustment of the questions in controversy, if either party desires such postponement.[12]

Under the terms of Article III of the treaty the joint high commission was authorized to examine into and report upon matters referred to it, to define the issues presented thereby, and to include in its report appropriate recommendations and conclusions. Article III further provided:

> The reports of the commission shall not be regarded as decisions of the questions or matters so submitted either on the facts or on the law and shall in no way have the character of an arbitral award.
>
> *It is further agreed, however, that in cases in which the parties disagree as to whether or not a difference is subject to arbitration under Article I of this treaty, that question shall be submitted to the joint high commission of inquiry; and if all or all but one of the members of the commission agree and report that such difference is within the scope of Article I, it shall be referred to arbitration in accordance with the provisions of this treaty.* [Italics supplied][13]

In its resolution of advice and consent to the ratification of the treaty, the Senate amended the treaty by, *inter alia*, striking out the last paragraph of Article III as quoted above, and included the following proviso:

> That the Senate advises and consents to the ratification of the said treaty with the understanding, to be made part of such ratification, that the treaty does not authorize the submission to arbitration of any question which affects the admission of aliens to the educational institutions of the several States, or the territorial integrity of the several States or of the United States, or concerning the question of the alleged indebtedness or monied obligation of any State of the United States, or any question which depends upon or involves the maintenance of the traditional attitudes of the United States concerning American questions, commonly described as the Monroe Doctrine, or other purely governmental policy.[14]

In view of the terms of the Senate resolution, President Taft did not proceed with the exchange of ratifications of the treaty.

The majority report on the treaty by the Committee on Foreign Relations[15] made this comment on the reference in Article I to the application of the principles of law or equity in arbitrable disputes:

> In England and the United States, and wherever the principles of the common law obtain, the words "law or equity" have an exact and technical significance, but that legal system exists nowhere else and does not exist in France, with which country one of these treaties is made. We are obliged, therefore, to construe the word "equity" in its broad and universal acceptance as that which is "equally right or just to all concerned; as the application of the dictates of good conscience to the settlement of controversies." It will be seen, therefore, that there is little or no limit to the questions which might be brought within this article, provided the two contracting parties consider them justiciable.

It was the last paragraph of Article III with reference to decision by a joint commission as to whether a difference between the parties was subject to arbitration under the treaty which gave rise to vigorous debate in the Senate. The majority report of the Committee on Foreign Relations stated:

> The last clause of Article III, therefore, the Committee on Foreign Relations advises the Senate to strike from the treaty and recommends an amendment to that effect. This recommendation is made because there can be no question that through the machinery of the joint commission, as provided in Articles II and III, and with the last clause of Article III included, the Senate is deprived of its constitutional power to pass upon all questions involved in any treaty submitted to it in accordance with the Constitution. The committee believes that it would be a violation of the Constitution of the United States to confer upon an outside commission powers which, under the Constitution, devolve upon the Senate. It seems to the committee that the Senate has no more right to delegate its share of the treaty-making power than Congress has to delegate the legislative power. The Constitution provides that before a treaty can be ratified and become the supreme law of the land it shall receive the consent of two-thirds of the Senators present. This necessarily means that each and every part of the treaty must receive the consent of two-thirds of the Senate. It can not possibly mean that only a part of the provisions shall receive the consent of the Senate. To take away from the Senate the determination of the most important question in a proposed treaty of arbitration is necessarily in violation of the treaty provisions of the Constitution. The most vital question in every proposed arbitration is whether the difference is arbitrable. For instance, if another nation should do something to which we object under the Monroe Doctrine and the validity of our objection should be challenged and an arbitration should be demanded by that other nation, the vital point would be whether our right to insist upon the Monroe Doctrine was subject to arbitration, and if the third clause of Article III remains in the treaty the Senate could be debarred from passing upon that question.
>
> One of the first sovereign rights is the power to determine who shall come into the country and under what conditions. No nation which is not either tributary or subject, would permit any other nation to compel it to receive the citizens or subjects of that other nation. If our right to exclude certain classes of immigrants were challenged, the question could be forced before a

12. *Ibid.* 255.
13. *Ibid.* 255-256.
14. The text of the resolution is reprinted in 6 A.J.I.L. 460-461 (1912).
15. S. Doc. 98, 62d Cong., 1st Sess. Quoted in editorial by James Brown Scott, *The Pending Treaty of Arbitration between the United States and Great Britain*, in 6 A.J.I.L. 167, at 171, 172-173 (1912).

joint commission, and if that commission decided that the question was arbitrable the Senate would have no power to reject the special agreement for the arbitration of that subject on the ground that it was not a question for arbitration within the contemplation of Article I. In the same way our territorial integrity, the rights of each State, and of the United States to their territory might be forced before a joint commission, and under Article III, in certain contingencies, we should have no power to prevent our title to the land we inhabit from being tried before a court of arbitration. To-day no nation on earth would think of raising these questions, which will readily occur to everybody. But if we accept this treaty with the third clause of Article III included we invite other nations to raise these questions and to endeavor to enforce them before an arbitral tribunal. Such an invitation would be a breeder of war and not of peace, and would rouse a series of disputes, now happily and entirely at rest, into malign and dangerous activity. To issue such an invitation is not, in the opinion of the committee, the way to promote that universal peace which we all most earnestly desire.

The minority report of the Foreign Relations Committee,[16] presented by Senator Elihu Root, stated in connection with the above-quoted views:

> It is true that there are some questions of national policy and conduct which no nation can submit to the decision of anyone else, just as there are some questions of personal conduct which every man must decide for himself. The undoubted purpose of the first article of these treaties is to exclude such questions from arbitration as nonjusticiable.
>
> If there is danger of misunderstanding as to whether such questions are indeed effectively excluded by the terms of the first article, such a danger, of course, should be prevented. No one questions the importance of having the line of demarcation between what is and what is not to be arbitrated clearly understood and free from misunderstanding; for nothing could be worse than to make a treaty for arbitration and then to have either party charged by the other party with violating it.
>
> The real objection to the clause which commits to the proposed joint commission questions whether particular controversies are arbitrable is not that the commission will determine whether the particular case comes within a known line, but that the commission, under the general language of the first article, may draw the line to suit themselves instead of observing a line drawn by the treaty-making power. If we thought this could not be avoided without amending the treaty, we would vote for the amendment to strike out the last clause of Article III, for it is clearly the duty of the treaty-making power, including the Senate, as well as the President, to draw that line, and that duty can not be delegated to a commission.
>
> We do not think, however, that any such result is necessary . . . it can be effectively prevented, without amending the treaty by following a practice for which there is abundant precedent, and making the construction of the treaty certain by a clause in the resolution of consent to ratification. . .
>
> Such a clause may well be, in substance, as follows:
>
> The Senate advises and consents to the ratification of the said treaty with the understanding, to be made a part of such ratification, that the treaty does not authorize the submission to arbitration of any question which depends upon or involves the maintenance of the traditional attitude of the United States concerning American questions, or other purely governmental policy.

If one reads "International Court" for "Joint Commission" in the above-cited paragraphs, it can be seen that the same essential questions were raised in the United States Senate fifty years ago as were raised in the Senate in 1946, and that the later Senate made in principle the same reservation as the earlier one. The arguments in favor of the United States' retaining the right to determine what matters are properly subject to the jurisdiction of the International Court have the same, if not greater, cogency today, and lead to the conclusion that the policy heretofore laid down by the United States Senate should not be altered. The Committee on Peace and Law through United Nations stated in its 1949 Report:

> Until there has been a clarification of the power of United Nations to determine international law and the effect of Article 2 (7) of the Charter, the committee does not believe that it is advisable that any change be made by the Senate of the United States in regard to compulsory jurisdiction of the International Court of Justice.[17]

In the light of present conditions and current events, it is difficult to question the correctness of this judgment.

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16. S. Doc. 98, 62d Cong., 1st Sess. Quoted in 6 A.J.I.L. 173-174 (1912).
17. 74 A.B.A. Rep. 336 (1949).

What Every English Child Should Know About Washington, D. C.

The nation's capital is known as the "City of Magnificent Distances", and visitors attending the Association's 83d Annual Meeting there this month will soon discover why if they attempt to explore it on foot in the late-summer heat. It can also be a confusing city for the stranger. On these pages, Judge Niles offers some explanations and some advice about the city to the Association's guests from abroad.

by Emory H. Niles • ***Chief Judge of the Supreme Bench of Baltimore City***

FEW AMERICANS KNOW much about the City of Washington; it may be assumed also that even fewer Englishmen learned about it at their mothers' knees. It is therefore obviously desirable that the English guests of the American Bar Association be given at least a dim, even if in some respects misleading, account of the city which is playing host to what is probably the largest gathering of Anglo-American lawyers ever held anywhere. In a spirit of helpfulness, therefore, these few words are offered as a syllabus, or headnote, to the full opinion which any court of competent jurisdiction might render on the grandeurs and miseries of the American national capital. Let us proceed therefore, historically and analytically, in the footsteps of Sir Matthew Hale, Pollock and Maitland, and Austin.

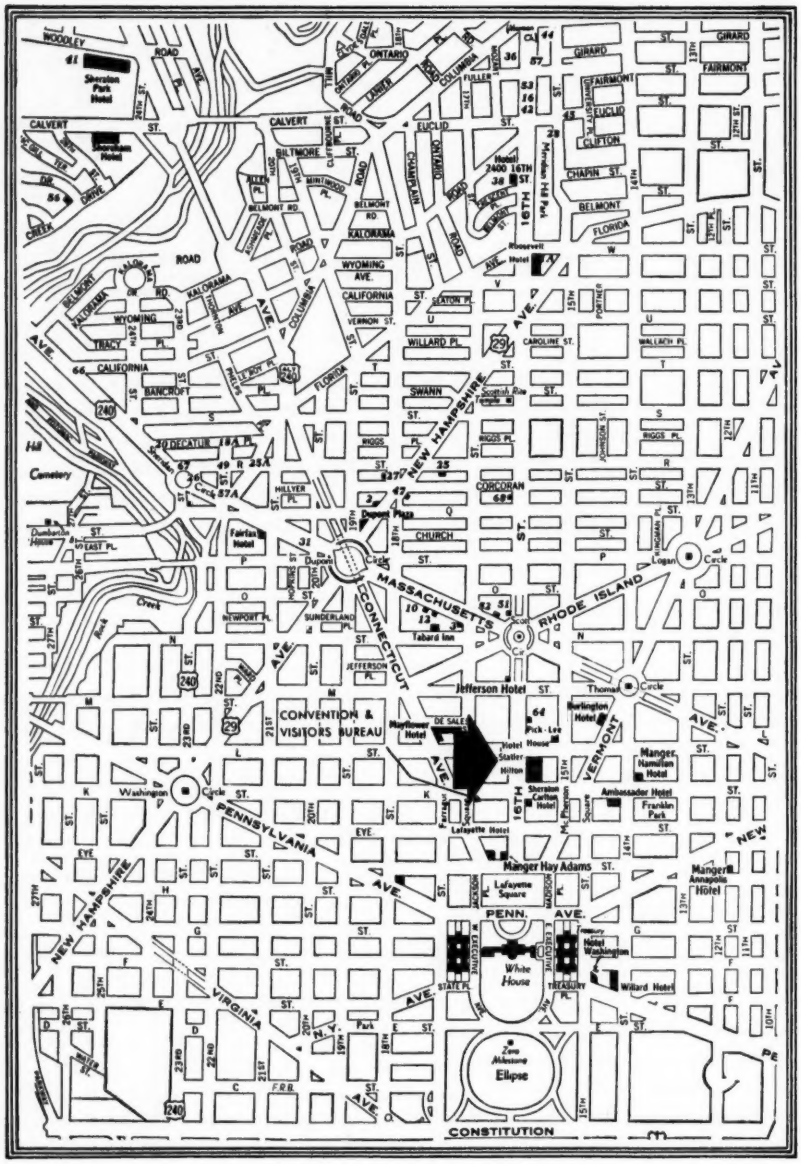
Historically, the capital owes its existence to two principal forces. The first was the jealousy between New York, Philadelphia, Baltimore and other cities, all of which desired the honor of being the "seat of the general government". The second was the fear, not that the government might be overawed by a pseudo-Roman or Parisian mob, but the reverse, *viz.*, that no state or other local government would be strong enough to protect the national government—a fear based on the recent experience of the Continental Congress which, in 1783, while sitting in Philadelphia, was threatened by mutinous soldiers of the Continental Army who demanded their pay and marched upon the hall in which Congress was sitting. At that juncture both the city authorities and the authorities of Pennsylvania appeared to be too weak to protect the Congress, which hastily adjourned, first to Princeton and then to Annapolis. After a great controversy it was decided to locate the capital on the Potomac River, far from any city or any state capital, in an area central to the whole country, and subject to the exclusive control of the Federal Government, where that government itself could make provisions for its safety.

Constitutionally, the size of the District of Columbia was fixed by the Constitution, which provided that Congress should have power "to exercise exclusive Legislation in all Cases whatsoever" over a district not exceeding ten miles square, which should become the seat of government. Curiously, nothing is said about executive or judicial powers. Nothing is said about citizenship or the right to vote. Actually, Congress governs the District of Columbia through three Commissioners and has withheld the right to vote from residents of the District, many of whom now clamor for that right. Legally the District is for some purposes a state and for some purposes not a state.

Geographically, the District is not a square, ten miles on a side. The original district laid out under George Washington's supervision was such a square, about half in Maryland and half in Virginia. The Virginia half extended to Alexandria, and included the land on which the Pentagon now stands. But the law provided that the public buildings for the Federal Government should be built on the Maryland side, and, as a result, the Virginians became dissatisfied. In 1846, therefore, Congress "retroceded" the southern half of the District to Virginia. This act, which accounts for the present unsymmetrical shape of the District, was, according to one writer, "the wickedest blow ever struck at the grandeur and majesty of Washington".

The City's Architect Pierre Charles L'Enfant

Topographically, the City of Washington owes its plan to a Frenchman, Pierre Charles L'Enfant, who was employed to design a capital city in what was then almost uninhabited farm, forest and swamp land. L'Enfant was a gifted man. He had studied the plans of Frankfort, Karlsruhe, Paris, Turin,



Map of Washington, D. C.

Bordeaux and other cities. He had the full backing of both Washington and Jefferson, but the task was great; jealousies were strong; and the beginnings were slow. L'Enfant was a proud and difficult man to deal with; he finally resigned. During the nineteenth century his plan was neglected, but in 1901, under President Theodore Roosevelt, it was revived and restored, so that the present city is essentially an enlargement of that envisaged by L'Enfant.

The innocent Englishman whose mother failed to instruct him with respect to the street plan of Washington may have some difficulty with it; but it is in essence very simple. His first act, whether he needs petrol or not, is to go to a "gas station" and obtain a map (free). From it he will see that the city is divided into four quadrants, N.W., S.W., N.E., and S.E. The White House, the American Bar Association headquarters hotel, most of the other hotels, and the principal shops are in "N.W." The primary street plan is the standard American gridiron of rectangular squares. But superimposed upon these rectangles is a pattern of avenues running diagonally. The intersections of these two patterns or networks form squares and circles. All the streets running east and west are lettered; all the streets running north and south are numbered. All the avenues, running diagonally, are named for states.

There are two great foci: the Capitol and the White House. The Capitol is at the assumed center of both the numbered and the lettered streets, and the White House is connected with it by Pennsylvania Avenue, "The Avenue", running diagonally from southeast to northwest.

There is also a great axis: the Mall, running east and west from the Capitol to the Lincoln Memorial, with the Washington Monument in the middle. On the north side of the Mall is Constitution Avenue, which should be B Street, N.W.; and on the south side is Independence Avenue, which should be B Street, S.W.

A subsidiary axis is 16th Street, running north from the White House. The headquarters hotel is at 16th and K Street, N.W. Automatically, one knows, then, that when there he is sixteen "blocks" west of the Capitol, and five "blocks" north of the White House, and eleven "blocks" north of the center of the Mall.

The White House was named because of a matter which may have been known to those English mothers, but which they delicately refrained from explaining to their sons. After the Red Coats had burned the public buildings in 1814, the "President's Palace" was charred and blackened. To restore it, it was painted white. And although its official name for many years was the "Executive Mansion", it is now officially named the "White House".

Washington Architecture—A Great Free-for-All

Architecturally, Washington is a great free-for-all. Those Englishmen whose mothers taught them that architecture is a living, throbbing expression of contemporary life, which should not imitate the dead styles of the past, will be disappointed by the great piles

of limestone and marble forming the federal triangle between Pennsylvania Avenue and the Mall, not to mention the earlier buildings such as the Treasury and the Old Court House.

Those Englishmen whose mothers taught them that rectangular blocks of glass, steel, aluminum and plastic do not represent all beauty and all art, and are not necessarily "exciting", will be happy to bask in the shadows of respectable conglomerations of classical elements thrown together to make such buildings as that of the Supreme Court.

Those who prefer the Beaux Arts may admire the Library of Congress; and those who are convinced modernists may admire the headquarters buildings of several trade unions. As in other areas of the arts, "you pays your money and you takes your choice".

Whatever that choice may be, the same mothers would undoubtedly have approved of the trees which line the Washington streets, and the green spaces which punctuate them, soften and embellish hard geometrical lines, and give some relief from the heat and glare which happily do not afflict London.

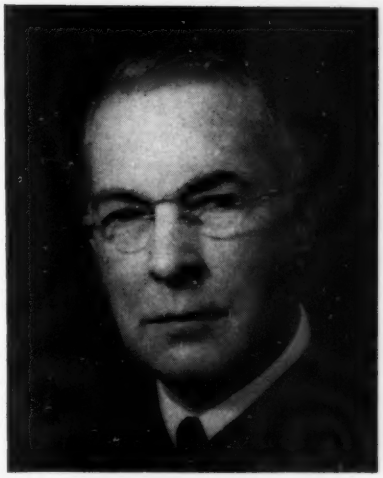
Washington Climate Is Indefensible

Climatically, Washington in August can not be defended. It is hot and it is muggy. If those English mothers did not advise their sons to wear cotton drip-dry suits, it could only have been through excusable ignorance. The advice now offered to every guest is to go straight to a "department store" and buy a drip-dry suit, made of cotton or a mixture of cotton and synthetic fibre, and at least two shirts of the same. Be sure to get a mixture, not an all-synthetic fabric. The Man-in-Apron can devise ways of washing these garments. And if he wears them while not wearing his apron, he will be less uncomfortable. A summer tuxedo, *anglice* white cotton dinner jacket, is also desirable. It is doubtful whether more than a handful of Englishmen could survive an American Bar Association dinner in woolen dinner jackets. Air-conditioning at the hotels will help, but the journeys between hotels are deadly.

Social Washington Is Complicated

Socially, Washington is complicated. An outsider like the author, even though his mother was American, is incapable of understanding it or of explaining it. Let it be noted that the various strata include the Official, the Diplomatic, the Political, the Bureaucratic, the Plutocratic and the Non-U circles. Glimpses may be had into any or all of these areas, but the English explorer must rely on his own gun and camera to protect himself and his lady. The Washington police are efficient, but the English visitor must not expect miracles such as are performed by their own bobbies.

Finally, it may be said that Washington has in the lifetime of most of the hosts at this meeting, been transformed from a rather ragged, partly down-at-the-heel, medium-sized town into a capital city which has all the elements of future greatness—a city which welcomes its English visitors, and in which it is hoped that the unavoidable lacunae in their earlier education at their mothers' knees may be hospitably remedied.



Emory H. Niles has been a member of the Supreme Bench of Baltimore City since 1938 and became Chief Judge in 1954. He received an A.B. degree from Johns Hopkins University in 1913 and was a Rhodes Scholar at Oxford from 1913 to 1916, receiving from that university the degrees of B.A., M.A. and B.C.L. He served as a captain in the Field Artillery in France during World War I.

AMERICAN BAR ASSOCIATION

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Signed Articles
As one object of the *American Bar Association Journal* is to afford a forum for the free expression of members of the Bar on matters of importance, and as the widest range of opinion is necessary in order that different aspects of such matters may be presented, the editors of the *Journal* assume no responsibility for the opinions or facts in signed articles, except to the extent of expressing the view, by the fact of publication, that the subject treated is one which merits attention.

Our Common Law

Thomas Jefferson, in cataloguing the misdeeds committed by King George the Third against the states which were declaring their independence, accused him of such unpleasant things as endeavoring to bring "the merciless Indian Savages" on the inhabitants of our frontiers, but he could find no basis for charging the King with anything as bad as depriving us of the common law. That that would have been regarded as the supreme misdeed is clear from the rest of the Declaration. It classed the King's action in giving his consent to the Quebec Act, which provided that questions of property and of civil rights were to be decided there according to French legal procedure, in the same category with the King's action in giving his consent to laws for "transporting us beyond Seas to be tried for pretended offenses". Thus a law "Abolishing the free System of English Laws", even if only in "a neighbouring Province", was treated as on a parity with a law for trying us ourselves overseas for pretended offenses.

It is not strange that when we won our independence we did not "abolish the free System of English Laws" of which a hostile King had not dared to deprive us. Of necessity the friendship that Burke and Pitt and Camden and Fox showed for us died with them, but the common law as a tie with the old mother country was imperishable and indissoluble. That grand old phrase took on a new meaning. The common law from thenceforward was the common heritage of sister peoples.

Three years ago we were refreshed at the fountainhead of the common law. Though entitled to no more than the welcome due to brothers in the profession we were treated like blood brothers by the English lawyers. We heard addresses delivered with a facility and grace that was the despair of those who had to reply in our rough and ready idiom. We saw cases tried with a courtesy and dispatch that made us wonder about the utility of our trench-warfare style of litigation. The differences created no barrier between us.

In welcoming our British brethren we now set as our goal a reception as cordial as that which they gave us. We look forward to the privilege of their company in our homes. We anticipate arousing their interest in our novel system of justice where one who feels himself aggrieved can go to a neighborhood lawyer and have him in person put the client's cause to the test through all the courts to the Supreme Court of the United States and without fear of crippling costs if his venture fails. They can see justice administered in Vermont where, in apparent distrust of the law, the lawyer judge is flanked by two lay judges. West Virginia lawyers can tell them how, until July of this year, the stream of the common law ran there in even more pristine purity than in England itself, so that former Ambassador John W. Davis, to the mystification of his brother Benchers of the Middle Temple, could tell how in the course of his early practice in West Virginia he had defeated an adversary so illiterate as to have made the mistake of using a *quod cum* in one of the actions where the pleading of matter of inducement was not permissible.

No matter whether the state is one where the development of the common law has been revolutionary or one where it has been backward, our visitors cannot fail to sense the common law's pervasive spirit. The bond that King Edward the Elder forged when he decreed that there should be one law common to all was too strong for King George the Third to break. We hope to make our visitors feel at home and, with the aid of the spirit of the common law, we expect to succeed.

Comparative Landmarks:

This Month's Cover

The cover for this issue of the *Journal* was designed to commemorate the participation of our English brethren of the law in our Annual Meeting which will open August 29.

The illustrations of the English landmarks recall the generous hospitality extended to us on our London pilgrimage in 1957. They will revive many happy memories of our unforgettable pleasures. The scenes of Washington may lead our English brethren to appreciate and discover some of our historic landmarks during their Washington visit.

The London scenes are familiar to all.

Buckingham Palace is as much a part of Britain's national life as our Capitol in Washington is a part of our national life. Planned originally by John Nash, the architect responsible for the layout of Regent's Park and the design of the National Gallery of London, the Palace was first intended as the private residence of the Sovereign. It was built in 1703, remodeled in 1825, and its present dignified façade dates from 1913. Queen Victoria made the palace her royal residence in London on her accession to the throne in 1836, and it has ever since been the home of English sovereigns.

From the palace and down past Birdcage Walk, at one end of the Houses of Parliament stands the Clock Tower, known everywhere as Big Ben. It looks out on Westminster Bridge and the Thames. Visible from all directions, Big Ben, the giant clock, is one of the finest timepieces in the world. Indeed, Big Ben is probably London's most famous landmark.

The clock and bell were the invention and design of a lawyer named Edmund Beckett Dennison. The clock has four dials each twenty-three feet square. The bell weighs about fourteen tons. It owes its distinctive hoarse tone to a crack which resulted from Mr. Dennison's use of an oversized clapper against the express instructions of the bell-maker. The mechanism which runs the clock is so sensitive that the weight of an English penny added to or removed from the tray on the pendulum adjusts the clock by 4/10ths of a second per day. The mechanism is run by descending weights of a steel cable

extending all the way to the bottom of the 320 foot tower. The bomb which damaged the House of Commons beneath the Tower in World War II, threw the clock off only a second and a half. The name Big Ben derives from Sir Benjamin "Big Ben" Hall, the Minister of Works under whose auspices the bell was installed in 1858.

A mile from the Houses of Parliament down the Strand and Fleet Street and just outside the old boundary of the City of London marked by the site of Temple Bar, stand the Royal Courts of Justice. The court buildings make an imposing series of Monastic Gothic

structures erected from 1874 to 1882. The main feature of the interior is a central hall 238 feet long and 38 feet wide, with mosaic pavement designed by the court's architect, G. E. Street. The buildings cost about a million pounds, most of which came out of unclaimed funds in Chancery. The principal entrance has a fine recessed archway flanked by towers in which are the entrances to the public galleries of the various courts. The Law Courts serve the Queen's Bench, the Chancery, and the Probate, Divorce and Admiralty Dvisions, and the Court of Appeal. Many of the judges sitting in these courts will be among our guests in Washington. In the central hall stands a marble statue of Sir William Blackstone presented to the Bar of England by the American Bar Association in 1924, and this fact has the distinction of being cited in most of the guide books on London.

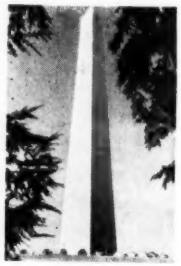
Within the shadow of St. Paul's Cathedral, the Renaissance masterpiece of Christopher Wren, England's greatest architect, is the Old Bailey dra-

matically crowned by the Statue of Justice. The Old Bailey, as we all know, is the colloquial reference to the Central Criminal Court, the chief Criminal Court for London, Middlesex, and parts of Surrey, Kent and Essex. It holds four courts and trials are open to the public. The court is on the site of Newgate Prison, always the site of a jail since the time of King John. The prison was completed in 1782 and demolished in 1902. Some of the old stone of the prison was used in the construction of the front of the court building. The statue is in bronze and the dome rises to a height of 195 feet. Below the copper-covered dome and over the columned entranceway are inscribed the words—DEFEND THE CHILDREN OF THE POOR & PUNISH THE WRONGDOER.

Our own National Capital boasts many notable landmarks. Our visitors will have occasion to see them all—the Jefferson Memorial, the Lincoln Memorial, the Smithsonian Institution, the White House, the National Art Gallery, the National Archives Building and many other buildings and memorials in and around Washington.

We have selected for our cover three landmarks to complement those of the London scene.

The Capitol is today probably the most outstanding of the buildings in Washington, for millions go through each year to see in person their representatives in the Senate and in the House of Representatives. The Senate and House have their separate wings on each side of the main central building. Meeting in Philadelphia in 1790, Congress passed an act removing the capital from that city to the District of Columbia, a tract of land ceded to the Federal Government by the States of Maryland and Virginia. A French army engineer, Major Pierre Charles L'Enfant, was engaged to draw plans for the city under the supervision and direction of President Washington. The Capitol was one of the first official buildings authorized by Congress and the cornerstone was laid on September 18, 1793. The building stands on a plateau 88 feet above the Potomac River level. The figure surmounting the dome of the Capitol is officially called the Statue of Freedom and was erected in December, 1863. It stands 19 feet 6 inches high and weighs 14,985 pounds. At its base is inscribed the motto *E Pluribus Unum.*



The Washington Monument is the world's tallest shaft of stone and masonry. Its construction was fraught with many tortuous developments. For periods of time there were bursts of inspiration and effort followed by long stretches of indifference. Eight days after General Washington's death, John Marshall asked Congress that "a marble monument be erected by the United States in the Capital, at the City of Washington" in his honor. The site itself had been chosen by General Washington as an ideal place for a memorial to the men of the American Revolution. The actual period of its construction covers the years 1848 to 1885. It was only after the Civil War, with the monument only partly finished, that the Government, by an act of Congress, officially took over its completion. The monument was opened to the public October 9, 1888. It cost about one million two hundred thousand dollars. It rises majestically to a height of 555 feet. Its base is a little over 55 feet and the top measures over 34 feet. At the base, the walls are 15 feet thick. The foundation goes down a little over 36 feet and weighs 36,912 tons. The monument itself weighs 81,120 tons. There are 898 steps inside the monument, but one need not climb to the top for the beautiful panoramic views, for there is an elevator that takes visitors to the top landing.

Standing separate and aloof from the Capitol is the glittering marble building which houses our country's

Supreme Court. It was completed in 1935 at a cost of approximately nine million seven hundred fifty thousand dollars, of which over three million dollars represents the cost of the marble, domestic and foreign, used in its construction. The room in which the Court holds its sessions covers 82 feet by 91 feet from wall to wall and is 44 feet in height. The room is regarded as one of the most dignified and magnificent rooms in the nation's capital. It has twenty-four columns of tinted Italian marble and etched in the marble panels are figures of Hammurabi, Moses, Solomon, Confucius, Mohammed and Blackstone. The building contains a library of some two hundred thousand volumes.

Our friends will have occasion to visit the Supreme Court while in Washington, and a special session of the Court is planned to admit new members during the Annual Meeting.

"The Supreme Court", said the late Chief Justice Charles Evans Hughes, "is the assurance that in the complexities of an extraordinary expanded life, we have not forgotten the ancient faith by which we have pledged ourselves to render each one his due." That faith is expressed in the marble pediment over the colonnade entrance in the engraved words: EQUAL JUSTICE UNDER LAW.

In suggesting the cover for this issue, the author used his own photos for the two scenes of the courts. The Capitol and Washington Monument photos were supplied by the United Press International. Grateful acknowledgment is made to the British Travel Association for the other photos.

MAX CHOPNICK

New York, New York

America Half a Century Ago:

The Impressions of an English Solicitor

The following was written by a London solicitor who visited the United States in 1905. He gives a vivid account of our country at that time which should be of interest both to our regular readers and to the Association's guests from abroad who will attend the 83d Annual Meeting in Washington this month. The letter was addressed to a friend in Essex and was dated "Philadelphia, Pa., U.S.A., December 29, 1905".

AS I HAVE TREATED you so abominably in the matter of letter writing for very many months past, am seizing a vacant moment to write you from this country. Like everything I have to do in this world, ever since you knew me, my movements are always pretty sudden, and I started for the States on forty-eight hours' notice.

Well, they call this a great country, and from a physical point of view they are justified. They also call it "God's country". I am not personally in the secrets of the Deity, and it is conceivable that he may have set his mark on this particular area of the world's surface, but if so I have not yet seen it, and I have found no man in the States who has been able to point it out, except one, and he an Englishman who alleged that the sun shone here more frequently than it does with us.

I will not weary you with the incidents of my journey over, except to say that I came in the new turbine boat, of 20,000 tons register. It is more like a floating hotel than anything I had ever seen. And only two or three facts are required to put you in possession of the size of the boat. It is longer than the whole front of the Law Courts, and if it were placed in the Strand opposite them, it would hide the whole of them from view, except the tall tower, and the chimneys would overtop them. It is 223 yards long, and 23 yards wide, and in spite of the fact that the weather was atrocious all the way across, there was so little motion in the vessel that at night you could lie in your bunk and believe you were on land because there was no vibration throughout the vessel.

Clam Chowder and Ice Water

My experiences began as soon as I landed. Calling a cab I was ushered into a vehicle somewhat like a sombre Lord Mayor's coach, with two horses, and I paid an official with gold lace, 8 s. 4 d. for the privilege of driving rather less than one mile. Everything is in the same proportion. A porter collected my few traps, and put me on the ferry boat with an upper deck, the size of a fairly large ball-room, and I was ferried across, free of charge, to the Pennsylvania Railroad Station, at Jersey City, where I took the train for Philadelphia. I had to pay the porter one quarter, equal to a shilling, for carrying my luggage. I was then taken to the cars and a numbered seat was given to me, the seat being in the nature of an armchair. This train was known as a "buffet train" and as I was pretty hungry, I ordered from the porter some lunch. A table was fitted in front of my chair, and I thought I would get acquainted with the institutions of this great country, and so ordered a clam chowder. When it arrived it seemed to consist to me of a sort of thin pea soup with muscles floating in it, and but for the sand in the muscles, and the somewhat new and not altogether pleasant taste, it was not altogether a failure as a soup. With the clam chowder was given a glass of ice water, and here let me say that there is no meal served at any time of the day or night, in which a glass of ice water is not *de rigueur*. On arriving at the Broad Street Station, Philadelphia, I was met by two gentlemen, and was promptly taken off to taste the pleasures of a cocktail. This particular variety of artificial drink is also an institution of this country. The bars are served, or "attended" as they say here, by men, and a woman is never seen either on one side of the bar or the other. The particular poison on this occasion was a Manhattan cocktail, and it consists of a few drops of angostura bitters, a little orange bitters, French vermouth and rye whiskey. This is placed in a tumbler with a quantity of cracked ice, shaken vigorously with the silver tumbler stuck inside mouth downwards into the glass tumbler, and then poured out into a wine glass, and a small piece of lemon rind, twisted by the nimble fingers of the bartender, on the top, and there you have the Manhattan cocktail in all its glory. It has a strong medicinal taste, and but for the honor and glory of the thing one might just as well take one's medicine with a little whisky. I

gather the American phrase "Taking one's medicine" comes from the drinking of cocktails.

I was then taken to a restaurant, and then for the first time, I became acquainted with another institution in this great country, that of the oyster. There are, I believe, seventy-three or seventy-four different ways of doing oysters, and to me, I confess, each is more repulsive than the one before. I vow that I will never dare to look an oyster in the face when once I leave this country. We had a half dozen Lynnhaven oysters, and considering that ice seems to be an essential article of diet here, these oysters were placed in a circle around a plate upon cracked ice, with a quarter of lemon in the centre. Each man was given a little pot of horse radish and onion mixed in a thinnish white paste, and there was on the table a bottle of Tabasco sauce, which is a violent liquid pepper, one drop of which placed on the tongue of a cat is liable to kill a man. I was astonished at the quantity of this horse radish sauce each man took. I tasted it but it did not appeal to me, so I was content with the lemon.

A Complaint Against American Meat

We then had another American institution in the nature of a Porterhouse steak, and here let me register a complaint against the nature of the meat supply. I am not surprised that you find one man in a thousand whose teeth are not either all gold or are largely composed of that precious metal. No man who has lived to the age of thirty in the States, but must have, at some time or other broken or damaged his teeth by trying to chew the meat supply. No wonder that the dental surgeon of America has reached a state of perfection, unknown in our poor, downtrodden, monarchical England. Men have whole front teeth made of gold, and sometimes two or three. They have one half a tooth, the lower half, made of gold, spots of gold throughout their teeth, and this is the same with women. At first it strikes an Englishman as somewhat strange, but he soon gets used to it. During the meal no wine or beer was drunk, nothing but the usual ice water, and afterwards we had coffee, and for some strange reasons, the Americans, who speak very little French, have dignified the after-dinner coffee by the name of *demitasse*.

My friends then took me to the hotel I was to adorn with my presence, and this is known as the "Bellevue-Stratford", and let me at once say that it is without exception the finest hotel I was ever in in my life, quite equal to if not superior to the Carlton Hotel in London.

Not a Fireplace in the Hotel!

Another thing struck me here which I had observed before to some extent. The whole hotel from top to bottom does not possess an open fireplace, and yet the temperature in the rooms is never less than 65 and runs up to 80°. There is not a fireplace in any of the bedrooms. Each bedroom has a lavatory and bathroom attached to it. The bathroom has marble sides, and a tesselated floor. The bath is made of porcelain, and my only complaint with regard to it is that it is too short for my somewhat lengthy body. The washstand in the bedroom has a mahogany top, and a clean linen table cloth which seems to me a very great waste, because you are bound to wet it every time you wash and the hotel people are bound to replace it with a clean one, and this brings me to the subject of linen. The bed is a magnificent brass structure. There are no bolsters, but two pillows.

There is not much necessity for blankets, but they give you one or two. The room is so warm that for the matter of that, you might sleep in your pyjamas on the top of the bed.

Each bedroom has in it a large cupboard with hooks all around for a wardrobe. The bed linen is changed every day. The dressing table has a chest of drawers under it, and a mirror on top the full length of the table. There is no fireplace, as I have said before, but a fan light over the door, so that a man can comfortably live in the room and have all his conveniences without ever stirring out.

Having gotten me to my hotel, my friends waited while I registered, and was shown to my room, and changed and had a bath and dressed, and then we had another cocktail, and presently another gentleman (I ought to mention here that every man apparently knows every other man so well that they never think of giving them "Mister" in front of their names, but use the short Christian name, Tom or Bob, as the case may be) turned up, and took the three of us to the Columbia Club to a beefsteak dinner.

Arriving at the Club, the local courtesies, including some Manhattans, were shown to us, and by this time you will be under the impression that the subsequent proceedings would not interest me any more, but there you are mistaken. Being a Scotchman I have a certain faculty for absorbing alcohol, without its having a serious effect upon me, and I was quite prepared for what might happen.

I was told to remove my coat, and I was furnished with a cook's cap (a male cook *bien entendu*), and a cook's apron reaching nearly to my feet. The waist band was carefully tied around my chest, and a large towel was inserted in the waist band. I was then requested to move down stairs into a cellar. I did not know at the time what they intended to do with me, but I was prepared for all eventualities. Perhaps they might want to initiate me into the Ancient Order of Buffaloes or some other outlandish order. There I found some forty other idiots in the same costume, and one who was the cook for the evening was busy cooking beefsteaks.

Beer, Steak Sandwiches and Dancing Girls

There was a slightly raised platform at the end of the cellar and chairs all around the rest of the room, and on a shelf along the walls, some seven feet high above the floor, were ranged a set of German drinking mugs, or "steins" as they are locally called, and in a corner was the bartender in white, presiding over a barrel of lager beer. Each man selected his stein, had it filled, and waited for the steaks. When these were done, two others of the party cut the steaks into thin slices, put them between two slices of bread, and hand-

ed them around to the guests. So it meant a hot steak sandwich, without salt or mustard, and the use of the towel was apparent for wiping one's hands after having indulged in a somewhat greasy meal.

While this was going on, certain ladies of the music hall profession followed one another in sequence, and danced or sang as their particular talents dictated. Then came a conjuror, and then a lady who danced in somewhat scanty costume, a dance which is known as the "Hootchy-Kootchy", an eastern type of dance, of which I can only say that the movements to me are neither graceful nor alluring, but still it seemed to give vast pleasure to the company. Then we all joined in songs, having books to see to be able to read the words, and somewhere about 11:30 the convention broke up. I came back on the cars with the men who had met me in the afternoon, and we went to a restaurant, and had lobster and champagne, and somewhere around one o'clock in the morning we got back to our hotel. My room was on the thirteenth floor, but I was not near the roof, because I was four floors below it, and so ended my first night on the shores of this great country. I forgot to add that at the close of the entertainment at the Columbia Club, a general desire on the part of the members, expressed very vociferously, induced me to get on the platform and make a speech. It did not last more than five minutes, but it seemed to please them, and for some minutes I felt like the President of the United States. I had to shake forty different hands, and I was told I was "a pretty damn good sort."

The Mason-Dixon Line— An Explanation

Talking of floors, brings to my mind the enormous height of the buildings in New York, Philadelphia and other cities. I am dictating this letter (in the states everybody dictates letters, and the art of letter writing will soon disappear altogether) on the seventh floor of a building which is seventeen stories high, to a stenographer who comes from Maryland, south of the Mason and Dixon Line. All this may be Greek to you, but I will explain that the Mason and Dixon Line is an imaginary line drawn from east to west dividing Maryland and Pennsylvania. The difference between the North and South in this respect, is that here in Pennsylvania, the street cars, railways and other public conveyances allow the Negroes full access to any part, while south of the Mason and Dixon line, by the Fifteenth Amendment to the Constitution of this great country, all carrying agencies are obliged to provide separate cars (locally known as "Jim Crow" cars) for colored people, and they are not allowed to enter any cars but those specially reserved for them. I have not asked the stenographer what her opinion is of my criticisms upon the institutions of her great country, but I guess she thinks that my ignorance is only equalled by my temerity in venturing to criticise anything that I may find here in the States.

The Windy City at One Degree Below Zero

I have now been here seventeen days, and during that time I have paid a visit to Chicago, known as the "Windy City". The temperature has never been above freezing anywhere that I have been, but at Chicago, 1,000 miles away, it was one degree below zero, but I assure you I felt it less than I would a damp foggy day in London, except for the wind. In Chicago, the wind always blows, and coming as it does from the north, over a plain some thousands of miles in extent, without any break, it makes it very cold. Chicago, being situated on Lake Michigan, also gets the wind from over the Lake. From what I saw, I should judge that for 500 miles around Chicago there is either level water or level plain, with nothing to break the severity of the wind. But it is a wonderful city, built in little more than thirty years, with a gorgeous park, and in spite of the fact that it is supposed to be the home of pork packers and wheat dealers, it has a wonderful appreciation of art, and has several important art galleries. At the hotel I stopped at, known by the name of the "Auditorium-Annex" (by the way another criticism,—the Americans seem unable to give a hotel one name. They seem to have to double it, adding thereby to its dignity and importance, Bellevue-Stratford, Waldorf-Astoria, Auditorium-Annex, etc.) there were some splendid paintings and the building itself was magnificent, and all the comforts and conveniences just as great, and except for the heat of the rooms and the ice water, I would just as soon be here as in England.

Every bedroom has a telephone by the bed-side, so that if a man felt lazy, he could carry on his correspondence and work in bed without difficulty. All the office buildings are just as fine. There is a row of five elevators or "lifts" and sometimes double that number, with an official who starts these off at regular intervals, just as though they were trains, so that the height of the buildings does not interfere with the comfort of the tenants, but the price of everything, speaking roughly is just about double the amount it is at home. My room costs me one pound a day.

The night of my arrival I looked out of my bedroom door to put out my boots and looking along the passage, and seeing no boots out, I thought they had either been stolen or kept inside with a string tied to them for fear they would be stolen, so I kept mine in. It was not until a week afterwards that I discovered by accident that in the wardrobe there is a box into which you put your boots. The front of the box has a glass door, facing the passage, and the porter comes along early every morning, takes out your boots, cleans them and puts them back.

When I awoke on the morning of the 12th, the morning after my arrival, I rang the bell and the waiter came. He was a stolid German. That is another thing. Many of the waiters are German or of German extraction. I said to him "Will you bring me a cup of tea?" He looked solemnly at me, and said, "Phat kind of tea?" Thinking to take a rise out of him, I solemnly answered, "Well if you could manage to fetch me some orange pekoe from Ceylon with a dash of China Green thrown in, I will try to make out with that."

He never smiled but replied as solemnly as before "I tink berhaps dey

maybe don'd haf it; would you haf some English breakfast tea?" Seeing that the joke had fallen flat, I as solemnly assented, and that brings me to another peculiarity of their feeding institutions in this country.

They have fourteen different kinds of tea. English breakfast tea costs 3 s. 6 d. to 4 s. 6 d. a pound and other qualities in the same proportion. They always serve cream with it, if it be cream and not calf's brains, and the invariable ice water. That cup of tea cost me 1 s. 3 d. I came down to breakfast and ordered porridge and milk. That cost me 3 s. and so in proportion for everything that you buy except oysters, which run to about 1 s. 6 d. a dozen. They have seventy-five different ways of cooking everything, but such articles of diet as I have tasted, and I have done little more, have not appealed to me in any way whatever.

I never now have any breakfast. I very often go without lunch until three or four o'clock in the afternoon, and when I do that I go without dinner. I have persuaded a waiter at the table I resort to to omit the ice water, and I am getting him into one or two other ways that appeal to me more than the customs here. When they bring you a dish of anything, they bring you as well two or three other little round saucers containing messes of different sorts. That I do not like, so that I get that ceremony omitted by my waiter.

Yesterday I went to a famous restaurant here, and seeing it on the bill of fare, I ordered an English chop. When it came it was three inches in thickness and eleven inches long. The waiter showed it to me, and then said, "Shall I carve it for you, sir?" The whole thing completely upset my appetite, and eventually I selected from what he had carved a piece about the size of half a crown, and that formed my lunch.

Well now, my dear, I have, I think, lengthened this letter as far as the stenographer will stand. She is wanting to go out for her lunch, and I have a lot to do, so I must say good bye...

American Association of Law Libraries Meets in Minneapolis

The 53d Annual Meeting of the American Association of Law Libraries was held in the Leamington Hotel, Minneapolis, Minnesota, June 26 through June 30.

The American Association of Law Libraries draws in members from practitioners' libraries (court, county, state, law office and bar association libraries), from law school libraries and a number of law publishers.

At the Minneapolis meeting the librarian of the Detroit Bar Association library, Helen A. Snook, became President of Libraries for the year 1960-61. Elizabeth Finley, Librarian, Covington and Burling, 701 Union Trust Building, Washington, D. C., became President-Elect for the coming year.

One of the outstanding accomplishments of the convention was the passage of a resolution at the closing session establishing a committee to formulate standards of accreditation for members of the law librarianship profession.

At the opening session the speaker was Gunnar H. Nordbye, Judge of the United States District Court, who spoke on the Lewis and Clark papers; Judge Nordbye having been the Judge who heard the case in the legal battle over ownership of the papers between the heirs of Clark and the government.

At the annual banquet, Charles S. Desmond, Chief Judge of the New York Court of Appeals, was the speaker. Judge Desmond spoke on the jury system in the United States and the possibility of its abolishment in civil cases in the future.

The Sacco-Vanzetti Case: The Trial of the Century

What was it about the Sacco and Vanzetti case that stirs so much controversy even today? Upton Sinclair's *Boston* and James T. Farrell's *Bernard Clare* borrowed heavily from its legend. It set the stage for Maxwell Anderson's *Winterset* and James Thurber's memorable comedy, *The Male Animal*. Was it this country's Dreyfus case, a *cause célèbre* in our time? Here is one account of what happened and how it started forty years ago.

by Barry C. Reed • *of the Massachusetts Bar (Boston)*

THURSDAY, APRIL 15, 1920, was payday at the Slater & Morrill factory at the lower end of Pearl Street in South Braintree, Massachusetts. Miss Margaret Mahoney, the firm's paymaster, segregated $15,776.51 into envelopes, then into two steel boxes. At 2:55 P.M., assistant paymaster Frederick A. Parmenter called for the payroll to deliver to the main factory some thousand feet east of the business office. Parmenter, age thirty-four, genial, father of two children, took the boxes and started down the stairs accompanied by his guard, Allesandro Beradelli. Miss Mahoney never saw them alive again.

Parmenter nodded to gate-tender Levangie as the pair approached his shanty at the railroad crossing. The 44-year-old Beradelli walked in silence, his thoughts on his 6-year-old daughter in the hospital with scarlet fever. Before passing beyond a fence, Parmenter turned and waved at the office, then walked toward unsuspected death.

Miss Annie Nichols glanced out of her window at the activity on Pearl Street. For a moment she watched some thirty laborers working on an excavation in front of her home. Across the street, the gaunt red brick Rice & Hutchins shoe factory was bathed in sunlight, its windows glistening red and orange. Beyond, the chimney of the grey, three-story frame building of Slater & Morrill belched smoke as its four hundred operatives churned out boots and shoes. She noticed two men leaning against an iron fence in front of the Rice & Hutchins plant. Her eyes then caught Beradelli and Parmenter walking with unconcern down the grade in the road. They were fifteen feet from eternity.

Two hundred feet further down the hill, aside of the Slater & Morrill plant, a large dark blue Buick, with side curtains drawn, engine running, lay in readiness. A fair-haired, sallow-complexioned youth, with sunken cheeks, wearing an overcoat with collar turned up, waited at the wheel.

As Parmenter and Beradelli drew abreast of the pair at the fence, one sprang toward the guard, firing a bullet into him point blank. Instinctively Beradelli reached for his hip pocket before three more shots sprawled him on the roadway. Parmenter turned to flee, but a bullet lodged in his spine. He staggered a few feet, his hand clasping the small of his back, then sagged to the ground.

With the brutal horror blazing before him, the driver of the Buick started toward the scene. Flinging the money boxes into the car, the murderers scrambled aboard, turning momentarily to send several shots at workers gathering at the factory windows. Terrified laborers at the excavation dove for cover as lead whined off a nearby brick pile.

Levangie, the tender, seeing the vehicle racing towards his station, in a moment of irate intrepidity began lowering the gates. A fusillade of bullets sent in his direction prompted him to scramble aside and the gates shot skyward. The Buick, side curtains flapping wildly, a rifle protruding from its rear window, roared through the crossing, spitting death along its path. Panic-stricken workers hugged the floor as windows shattered above them, while those caught in the gauntlet of fire on Pearl Street dug their fingernails into the sides of buildings or cowered in doorways as the death car swept past. With screeching tires, it turned left and vanished.

April 15, 1920, witnessed a vicious slaying on the streets of South Braintree. Yet despite its savagery, despite its dramatic boldness, it was not unusual. Although confining the defeat of Walter Johnson in the Red Sox opener at Boston to the sports page, it would fail to rate space beyond the local dailies. In immediate notoriety, it would fail to equal the gangland

slaying of Chicago's Big Jim Colosimo who was to be gunned down a week later. The events to follow, however, would rock the world.

It was not a somnolent world, this world of April, 1920: revolution was ripping Russia, Ireland stirred with discontent and Mexican bandit chieftain Pancho Villa started to move down from the Sonora Hills. Yet, an ocean apart from the ferment, the Great Republic once again lapsed into its hedonistic crucible. America was drinking near beer, singing "My God How the Money Rolls In" and reading Sherwood Anderson's *Winesberg, Ohio.* It was the age of F. Scott Fitzgerald, Gilda Gray, Theda Bara and Babe Ruth. It was wonderful. But the music could stop abruptly, the glass be lowered to the table without a sound, and a citizenry quickly sobered when murder crushed out the life of its fellow man.

The Investigation Begins

Slowly pieces of information began sifting in. Witnesses described four passengers of the bandit car as swarthy, medium in height and build, in their thirties, probably Italians; the driver as fair-haired, sallow complexioned, much younger in age. Discovered at the scene was a dark cap, purportedly dropped by Beradelli's assassin and four .32 calibre brass shells, one a Winchester, the initials W. R. A. inscribed on its base. Five bullets removed from the bodies were .32 calibre, apparently fired from a Savage automatic; the sixth, the one that actually snuffed out the life of Beradelli, a relatively obsolescent Winchester brand, fired from a different automatic, a .32 Colt. The guard's five-chamber .38 calibre Harrington & Richardson revolver was nowhere to be found. Two days later, the car, which had been stolen, was located in a heavily wooded section of West Bridgewater, some thirty miles from the scene of the crime. Several 12-gauge shot-gun shells were recovered on the ground nearby. These were the clues, but for three weeks all leads collapsed.

Bridgewater Chief of Police Michael Stewart noting the similarity between the South Braintree murder and an attempted holdup of a $30,000 payroll of the L. Q. White Shoe Co. in Bridgewater on December 24, 1919, made the rounds of the local repair shops and discovered that one Mike Boda had left his debilitated 1916 Overland coupe at the Elm Square garage on April 18. Both Boda and his landlord, Furruccio Coacci, living within two miles of the woods where the Buick was found, had been under Stewart's surveillance for some time. Mulling over rumors that Boda had been seen driving a Buick, Stewart left word with the proprietor Johnson to call when someone came for the car. The trap for Boda and accomplices was set.

At 9:30 P.M. on the moonless May 5, 1920, a motorcycle with side car pulled into the Johnson yard. The low ground fog shimmering in front of the headlight swirled about four shabbily dressed figures, one, Boda making inquiry about his car. At the same instant, the jangled ring of the telephone jostled Chief Stewart from his slumber. He recognized the trembling voice of Mrs. Johnson as she whispered, "Come quick, Mr. Stewart, they're here."

Sacco and Vanzetti Arrested

Thirty minutes later two Brockton police officers boarded a Bridgewater-to-Brockton street car and arrested two of the men who had visited the Johnsons; one a shoeworker from neighboring Stoughton, Nicola Sacco, and the other a fish peddler from Plymouth, Bartolomeo Vanzetti. The arrest of the driver of the motorcycle, Ricardo Orciani, soon followed. The inscrutable Boda was never seen again.

Sacco, age 30, a family man, was dark, almost olive green in complexion, with piercing eyes and a brooding face which was strangely handsome. Vanzetti, age 33, unmarried, had deep set eyes, high cheek bones, with a ferocious walrus mustache bristling beneath his pronounced nose. To those who scrutinized the pair at the police station, dishevelled, with a two-day growth of beard, "they looked like bandits".

Sacco was relieved of a fully loaded .32 calibre Colt automatic and twenty-one extra shells, several being Winchester make similar to the bullet fatal to Beradelli. In his pocket was a passport to Italy. He denied ever being in South Braintree, claiming he had worked the day of the crime. However, a check disclosed the usually industrious Sacco absent from work on April 15; further information being developed that he had once worked at the Rice & Hutchins plant.

When arrested, Vanzetti had in his possession a fully loaded five-chamber Harrington & Richardson revolver similar to the missing Beradelli gun and four 12-gauge shot-gun shells resembling those found near the abandoned car. Although he admitted buying the gun he incorrectly described it as containing six cylinders. When he stated he had purchased the gun's cartridges in one box, the authorities felt they had part of the bandit gang. The cartridges were of varying makes.

The day following, Assistant District Attorney Kane announced to the world that Sacco, Vanzetti and Orciani were implicated in both the South Braintree and Bridgewater crimes. Coacci, who had been deported to Italy April 18, the Justice Department being unaware of any possible complicity in the crime, was termed the master criminal. Orciani, after being taken to the scene for a re-enactment in the actual bandit car, was readily identified by numerous would-be Commonwealth witnesses; an identification that stultified the authorities who later learned that Orciani had worked a full day at the time of both hold-ups. Sacco, likewise, had worked on December 24. Only the self-employed Vanzetti, lacking an immediate alibi, could be implicated in both crimes.

The Trial Begins

On June 22, 1920, in a small red brick courthouse at Plymouth, not far from the rock emblazoned with the numerals 1620, Vanzetti, identified by five eyewitnesses as at or near the scene of the crime, was tried and convicted for the attempted holdup at Bridgewater. Vanzetti, acting upon advice of counsel John Vahey, declined to take the stand; this failure and the riddling cross examination by the prosecuting attorney of a score of alibi witnesses perhaps sealed the fate of Sacco and Vanzetti for all time.

However, Vahey's decision was not made without calculation. He feared the consequences of disclosing Van-

zetti's political philosophy of anarchism, not an award-winning attribute in the times of the "Palmer raids".

An augury of events to come occurred earlier when John Graham, counsel for Sacco at the probable cause hearing, apparently caught the medical examiner, Dr. Fred Jones, in a gross exaggeration when the latter testified to being thoroughly familiar with gun shot wounds, having treated several thousand of the type in issue. Graham, fighting desperately to quash the case, pushing his face within inches of the doctor, waiting until the ticking of the courtroom clock could be heard, asked, "Where?"

"On the battlefields in France," was the reply.

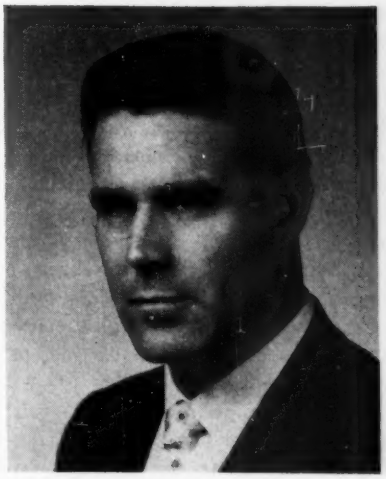
On Memorial Day, May 30, 1921, proud warriors of the Grand Old Army, the last remnants of the 2d and 20th Massachusetts Infantry, who had fought at Fair Oaks and Malvern Hill, stormed Mayre's Heights and held the line at Resaca, stood at attention with veterans of recent wars as Taps drifted over Hyde Park Cemetery, the final muster for those who died at Lexington, the Wilderness, Santiago and the Argonne. It was an era of patriotism and chauvinism that this country has never seen since and perhaps will never see again. The day following, within the dying echo of the bugle, two men, aliens, anarchists and draft dodgers, were to be tried for murder.

For seven weeks in the Norfolk County courthouse at Dedham, pierced by the constant rapping of Judge Webster Thayer's gavel, the trial ebbed and flowed. Seven Commonwealth witnesses gave direct testimony linking Sacco to the crime. Bookkeepers, Miss Mary Splaine and Francis J. Devlin, identified Sacco as the man leaning out of the bandit car as it raced toward their second-story observation post. Mrs. Lola L. Andrews, a young housewife, recalled seeing Sacco working under a car about 11:30 A.M. in front of the Rice & Hutchins factory, relating that she had asked him directions to the firm's office. Joseph Pelser, a shoe-cutter on the first floor of the same plant stated that Sacco was the dead image of the man he saw standing over the dying Beradelli. Salesman Carlos E. Goodridge testified that the bandit car came within twenty-five feet of him and that Sacco was the occupant who pointed a gun in his direction. William S. Tracy, a store owner, related seeing Sacco and an unidentified man leaning against a drugstore window about 11:35 A.M. Finally, railroad policeman William J. Heon told of seeing Sacco and another in the men's waiting room of the South Braintree train station at 12:27 P.M. on the day of the crime.

Were the Witnesses Right?

The testimony of all was shaken considerably by the scathing cross examination of defense attorney Fred H. Moore. Moore, a fiery, indefatigable, West Coast Irishman, drew the admission from Miss Splaine that at the probable cause hearing she testified to having insufficient opportunity of observation to say that Sacco was the man. Miss Devlin acknowledged saying at the same hearing that she couldn't say positively Sacco was the man, that the man she observed was tall. Several defense witnesses testified to subsequent conversations with Mrs. Andrews and Goodridge wherein both admitted being unable to identify anybody at Braintree. Moore commented that it seemed strange Mrs. Andrews should stop to ask directions from a man under a car when another stood nearby. Pelser acknowledged telling a representative of the defense that he did not see the man who shot Beradelli. Tracy's testimony ran counter to that of Mrs. Andrews, both as to time and the manner of dress of the man each testified to seeing. Only the testimony of Heon went in unquestioned.

Vanzetti, being tried under the felony-murder rule, was connected to the crime mainly by the testimony of Austin T. Reed, a railroad gate tender who told of stopping a car at 4:15 P.M. for a train at a crossing near West Bridgewater, identifying Vanzetti as the occupant who questioned him about the delay. Other testimony concerning Vanzetti's presence in the vicinity of South Braintree was unconvincing; gate tender No. 1, Levangie, to the chagrin of the district attorney, placed Vanzetti in the driver's seat as it passed his shanty.



Barry C. Reed was born in San Francisco in 1927. He was graduated from Holy Cross College in 1949 and from Boston College Law School in 1954. During World War II he was a staff sergeant in the Army. He now practices law in South Braintree, Massachusetts, the town where the crime took place that led to the Sacco-Vanzetti trial.

Devastating Circumstantial Evidence

The circumstantial evidence was far more devastating. Although some evidence was produced showing that Beradelli brought his revolver to a Boston gun shop for repairs to the hammer, there being no record of redelivery, one Bostock testified to seeing Beradelli with the gun the Saturday before the crime. Contending that the weapon found on Vanzetti was the missing Beradelli revolver, the Commonwealth attempted to demonstrate that the hammer of the exhibit gun was new in comparison with its other parts. Medical examiner George B. McGrath identified the bullet fatal to Beradelli from needle marks made after extraction; the bullet (exhibit 18) later figured as perhaps the most important single element in the entire case. Based on experimental firings, ballistic experts Proctor and Van Amburgh were of the opinion that the fatal bullet and the Winchester cartridge found at the scene came from the Sacco gun. Finally Sacco's employer, George T. Kelly,

testified that the cap found on Pearl Street looked like one worn by Sacco on prior occasions.

The cross-examination of the state's ballistic experts by the cooler, more deliberate associate defense counsel, Jeremiah J. McAnarney, was thorough. State Police Captain Proctor, after testifying to twenty years of experience with Colt firearms, when requested to disassemble one, fumbled for several minutes before Van Amburgh came to the rescue. Yet the inevitable web of circumstances kept tightening.

Mr. and Mrs. Johnson repeated their story of the defendant's eerie visit with Orciani and Boda on the night of May 5. Arresting Officer Connolly related how Vanzetti made a move for his inside pocket before being relieved of a loaded revolver, and told of finding a rifle in Sacco's home; the latter was excluded as evidence although the rifle remained in view for several days. On a sweltering June 22, after the shirt-sleeved jurors had listened attentively to Chief Stewart adding the falsifications made by both Sacco and Vanzetti concerning their meeting with Boda and Orciani, the government rested its case.

Vanzetti and Sacco in custody

Wide World Photos

Discrepancies in the Evidence

Of the twenty-eight witnesses called by the defense to relate details concerning the shooting, few would exactly exclude Sacco's presence at the crime; some unwittingly corroborated the general identification and circumstances already placed in evidence by the Commonwealth. Most couldn't recall the side of the car the bandits entered, one had a light-haired man as Parmenter's killer, others claiming an excellent view of the bandit car, differed as to whether a rifle protruded from its rear window and many forgot their testimony of the day previous.

Trying the case for the Commonwealth was District Attorney Frederick G. Katzmann, veteran of eleven years of prosecution experience. Product of Scotch-German parentage, tireless, adroit and forceful, he had a reputation among the Bar of not hitting below the belt, but one who would give you an horrendous going over above it. During the gruelling trial he repeatedly impeached or discredited witness after witness, mixing his attack with subtleness, anger, kindness or whatever best penetrated the defense.

One of the laborers at the excavation had testified to being within fifty feet of the shooting, being explicit that neither defendant shot Beradelli. Under interrogation by Katzmann he pointed to a map showing where he stood, emphasizing that he was as certain of his statement exonerating the defendants as he was of the distance to the scene. The district attorney then demonstrated the distance to be ninety-five feet.

Another witness, Frantullo, after relating how he paused a moment before passing the men leaning against the fence, hence being able to remember their features, dress and manner of speech, further being certain that Sacco and Vanzetti were not these men, was led by Katzmann and stopped for a second in front of two jurors. Then, with back turned, he was asked to describe the men. "They have no hats", stated Frantullo. This was about as close as he came.

To place Vanzetti some twenty-five miles distant at the time of the crime, Joseph Rosen, a peddler, testified that while in Plymouth he showed a piece of cloth to Vanzetti and Mrs. Alfonsina Brini about 11:30 A.M.; Mrs. Brini and her pretty daughter corroborated Rosen. Malcolm Corl, a fisherman, testified that Vanzetti was with him about ninety minutes that afternoon. Katzmann, reverting to a memory game (where were you on the 18th, the 22d, how do you recall it was the 15th? etc.), completely confused all but Mrs. Brini; the latter was certain of the date she met with Rosen since she had been seen by her doctor earlier that morning. However, to prevent Katzmann from going into the Bridgewater hold-up, defendants' counsel agreed to an instruction that the witness, Mrs. Brini, had in another case testified in behalf of Vanzetti differently as to his whereabouts in that case.

It was June 30, 1921, when Mrs. Brini stepped from the stand. The bookmakers were giving three-to-one that Jack Dempsey would stop French heavyweight Georges Carpentier in

Jersey City the following Saturday. The odds against Sacco and Vanzetti were greater.

In concluding its case the defense aligned its most impressive witnesses in later order so that their voices would ring in the jurors' ears during their deliberations—perhaps a phrase or thought to tip the scales. Messrs. Burns and Fitzgerald, qualified ballistic experts, were both of the opinion that the fatal bullet was not fired from Sacco's gun. Fitzgerald maintained that the off-center blow of the firing pin on the exhibit and experimental cartridges was an almost universal condition. Several witnesses were introduced to trace ownership of the Harrington & Richardson revolver to Vanzetti; their testimony, however, was far from convincing. A former employee of the Italian consulate in Boston, by deposition obtained in Italy, recalled Sacco's visit to the consulate on the afternoon of April 15, yet on cross-examination could not describe others seen on the same day or days immediately following. John D. Williams, an advertising agent, testified to meeting Sacco with a few others at a Boston restaurant about 1:15 P.M. the afternoon of the crime.

The Defendants Testify

First Vanzetti, then Sacco took the stand. Both bared their souls and admitted having fled to Mexico for pacifistic reasons to avoid the draft during World War I (a draft to which as aliens they unknowingly were not subject). They traced their movements on April 15 to the night of their arrest and admitted their many falsifications made at the police station, claiming they were prompted through fear of arrest as anarchists. Vanzetti, intelligent, even articulate, with only a trace of an accent, repeatedly parried the barbed queries of the district attorney. Sacco, however, was no match for the resolute Katzmann. He was easily confused, nervous and at times blurted responses without being fully cognizant of the questions. After admitting going to Mexico to avoid the draft, Sacco's face became drained of color when Katzmann snapped, "Would it be your idea of showing your love for your wife, to run away when she needed you?"

If Katzmann was not the master of every moment during the long trial he was master of the last. Moore and McAnarney, fatigued by the strenuous battle, closed with satisfactory perorations. Katzmann chided the defendants' claim of pacifism, pointing out that when arrested they had enough ammunition to kill thirty-seven men. He defied anyone to look at Miss Splaine and Miss Devlin and then believe that either would condemn a man to death by a willful lie... "Gentlemen of the jury," he closed, "do your duty. Do it like men. Stand together, you men of Norfolk."

A stillness fell on the crowded courtroom at 8:00 P.M., on July 15, 1921, as the jury, out for five hours, filed in. Vanzetti knit his brow, Sacco, deadly pale, glanced from juror to juror, and McAnarney, sensing a sinister significance in the shortness of the deliberation, made a gesture of despair.

"Guilty of murder in the first degree" was the verdict to the world. Vanzetti, stunned, stood speechless in the prisoner's cage with his right hand in the air.

"*Sono innocenti!*" screamed Sacco as his wife ran to him and buried her face in his neck, crying uncontrollably. The trial of the century was over.

It is doubtful that this country ever again will witness as titanic a struggle as was waged for the next six years for the release of two condemned men. Sacco and Vanzetti became such symbols that original issues disintegrated and at times it was difficult to discern the trier from the tried. Writers, jurists, politicos and scholars became embroiled in the conflict. Dean Wigmore of Northwestern clashed with Professor Frankfurter of Harvard. Writers John Dos Passos, Upton Sinclair and Heywood Broun closed ranks with the defense.

"The Jury Was Deceived"

Following denial of a motion for a new trial, the defense filed eight supplemental motions, one of which was its trump card. State Police Captain Proctor, who had figured extensively in the trial as a commonwealth ballistic expert, signed an affidavit that his testimony had been framed; that his opinion that the fatal bullet in appearance was consistent with having been fired from Sacco's gun was another way of saying it might have been, but he found no evidence that it was, and that the district attorney knowing his state of mind deliberately rigged both question and answer to deceive the jury. The assertion brought heated denials from Katzmann and assistant Williams, the situation being further colored by an existent enmity between Proctor and Katzmann over the latter's refusal to honor Proctor's $500 fee for expert services. On October 1, 1924, Judge Thayer denied all motions for a new trial, placing no credence in the Proctor affidavit.

Wide World Photos

Nicola Sacco being taken from jail to a hospital. He is being aided by his wife and officials.

One final attempt to save the doomed men occurred in May, 1926. The defense filed a new motion based on the confession of a young Portuguese, Celestino Madeiros, exonerating Sacco and Vanzetti of the South Braintree crime and implicating the Morelli gang of Providence. Possibly less credence was placed in the Madeiros confession since Madeiros, an inveterate criminal, confined to the same jail as Sacco, was awaiting appeal from a conviction of slaying a bank cashier. The defense had played out its hand.

Massachusetts Governor Fuller, in June, 1927, appointed Harvard President Lowell, Massachusetts Institute of

Technology President Stratton and former Probate Judge Grant as a special advisory committee to investigate the case. Its report was unanimous; the defendants were guilty beyond a reasonable doubt and the trial had been fair.

Slim channels for appeal or intervention were still being pursued when at midnight, August 23, 1927, at the heavily garrisoned Charlestown prison, both defendants, professing their innocence, walked to their death bravely. First Vanzetti, who during the intervening years had turned out letters to be ranked with the classics, marched toward the steel door. A sort of Abou Ben Adhem atheist, he shook hands with all near him as they strapped him in the chair. With "Long Live anarchism!" sticking to the lips of Sacco, the saga of Sacco and Vanzetti was over.

Were They Guilty?

Were Sacco and Vanzetti actually guilty? Perhaps. Many have thought the circumstances too numerous to be accounted for by chance. In June, 1927, Major Calin Woodard, a ballistic expert from New York, by means of a prism device, matching half of the fatal bullet with the other half of one fired experimentally, demonstrated so conclusively that both bullets came from Sacco's gun, that defense expert Professor Gill of Massachusetts Institute of Technology tendered his resignation. Joe Morelli, mentioned by the defense as the real mastermind of the crime, probably had nothing to do with it. Morelli died in 1950, a few days after promising former Rhode Island Attorney General Louis V. Jackvony a clarification of his role in the case. Jackvony succumbed four months later, a search of his files failing to disclose anything reflecting on the South Braintree crime.

Were Sacco and Vanzetti recipients of a fair trial? This, the paramount question, results today as it did then in bitterly divided opinion. To resolve such questions, and moreover to benefit from the immeasurable wealth of knowledge smoldering within its chapters all lawyers should at least sift through the record; those with a proclivity toward criminal law should digest it. It is a case, unparalleled in fact or fiction, which will never lie dormant in its place in history.

Association Calendar

Annual Meetings

Washington, D. C.	August 29-September 2, 1960
St. Louis, Missouri	August 7-11, 1961
San Francisco, California	August 6-10, 1962

Board of Governors Meetings

Fall Meeting, Chicago, Illinois	October 27-28, 1960
Midyear Meeting, Chicago, Illinois	February 17-18, 1961

Midyear Meeting

Edgewater Beach Hotel, Chicago	February 16-21, 1961
Administration Committee	February 16, 1961
Board of Governors	February 17-18, 1961
Group Meetings	February 18-19, 1961
House of Delegates	February 20-21, 1961

Section Chairmen

Annual Conference, Chicago, Illinois	October 29-30, 1960

Regional Meetings

Houston, Texas	November 9-12, 1960
Indianapolis, Indiana	May 11-13, 1961

Equality Versus Liberty: The Eternal Conflict

Mr. Pittman believes that the current emphasis upon "equality" is misconceived, in spite of many statements by responsible men that "equality" is a basic tenet of American government. He argues that, by its very nature, "equality" is inimical to "liberty" and his research casts new light upon the eighteenth-century meaning of the Declaration of Independence's statement that "All men are created equal".

by R. Carter Pittman • *of the Georgia Bar (Dalton)*

> Inequality will exist as long as liberty exists. It unavoidably results from that very liberty itself.
> —Alexander Hamilton

DURING RECENT YEARS many articles have appeared in learned journals in which it is stated in one way or another as a "fundamental principle" that America was founded upon the proposition or conceived in the philosophy that "all men are created equal". For a convenient text we quote from an article by Charles H. Davis, Justice of the Illinois Supreme Court, appearing in the March, 1959, issue of the AMERICAN BAR ASSOCIATION JOURNAL entitled "Constitutional Law: The States and the Supreme Court". While discussing various proposals to limit the jurisdiction of the Supreme Court, on page 311, he said:

> The worth of such proposals should be viewed in the light of a recurrence to the fundamental principles of our civil government. America was conceived in the philosophy "That all men are created equal".

Similar statements are to be found in speeches made or read by Presidents, Vice Presidents, and members of the Congress. The doctrine of human equality has found its way into judicial decisions of our highest courts.

In its official *Report* of September 9, 1959, the Civil Rights Commission asserted on page 3:

> The Declaration of 1776 recognized as the first principle of our independence that all men are created equal.

Vice Chairman Robert G. Storey and Commissioners John S. Battle and Doyle E. Carlton dissented, because "such assertions ignore historical fact" but, nevertheless, this assertion and others of like content were officially embodied in the *Report* by vote of three to three and the dissent merely footnoted.

Many of the so-called "Civil Rights" bills introduced in the Congress in recent years recite as the basis and foundation for their provisions the doctrine that all men are equal.[1] Human equality was the doctrinal basis for *Brown* v. *Board of Education* of May 17, 1954, and subsequent integration decisions.[2]

American high school and college textbooks are loaded with equalitarian propaganda, all pointing to the Declaration of Independence equality clause as the "American dream" or the "American ideal" or the "American creed". For example in *Democracy vs. Communism* (1957) by Kenneth Colegrove and others, prepared under the auspices of The Institute of Fiscal and Political Education, as a high school text to explain the differences between democracy and communism (now widely used in American public schools) it is stated on page 31:

> The Fathers of our nation accepted as a basis for the Constitution the Declaration of Independence.

and on page 43:

> The Declaration of Independence states that "all men are created equal", and it means exactly what it says.

To appropriate the words of Justice

1. For example, House Resolution 627 introduced by Mr. Celler, a member of Congress from Brooklyn, in 84th Congress, recited as its basis "the American principle of equality".

2. AN AMERICAN DILEMMA (1944) by Karl Gunnar Myrdal, cited by the Supreme Court as "modern authority" for its decision in the *Brown* case, at 347 U. S. 494, defines the doctrine of human equality as "the highest law of the land" on page 9, and on page 14 "the philosophy that all men are created equal" is "the American creed".

In *New York State Commission Against Discrimination* v. *Pelham Hall Apartments, Inc.*, 10 Misc. 2d 334, 341; 170 N.Y.S. 2d 750, 757 (1958), Justice Eager also treated the philosophy of human equality as the highest law of the land and upheld a clearly unconstitutional law banning discrimination in publicly assisted housing, saying:

> The private ownership of private property free of unreasonable restriction upon the control thereof, is truly a part of our way of life, but, on the other hand, we, as a people do hold firmly to the philosophy that all men are created equal.

For a critical discussion of the New York case see *Anti-Discrimination Legislation as an Infringement on Freedom of Choice*, by Alfred Avins, 6 NEW YORK LAW FORUM, January, 1960, 13, 16.

Davis, the equalitarian doctrine itself "should be viewed in the light of a recurrence to the fundamental principles of our civil government". Given a little patience and an open mind the truth may be seen in such a light.

No one questions the right of all men to equal justice under law, but propagandists have carried the doctrine beyond equality of rights to equality of things, and men are heard to proclaim human equality who would revolt at the suggestion that all birds, all fish, all cattle, all dogs or all race horses are equal. Of course, all men are *not* created equal any more so than are all other members of the animal kingdom. Even if they are *created* equal, creation ends when life begins, and life is always unequal. Nevertheless, we are told over and over again and again that all men are equal and the Declaration of Independence is cited as final authority.

The Declaration Is Not the Law

The Declaration of Independence never became living law in America, and no provision of the Federal Constitution or Bill of Rights can be traced to it and, as this article will demonstrate, its influence on state constitutions and bills of rights has been insignificant. It was written to serve the temporary purposes of a sanguinary conflict. It was and perhaps will ever be history's most effective piece of propaganda, but it neither grants nor protects human rights.

The first paragraph of the Declaration speaks of the necessity "for one people ... to assume ... the *separate and equal* station to which the laws of nature ... entitle them", thus reaffirming the *separate and equal* station doctrine established by nature under which all great people have progressed throughout history. Then follows, "... all men are created equal", equating "one people" with "all men" and "created" with "laws of nature". No one who helped to write it or who voted to adopt it ever asserted the doctrine of human equality either before or after July 4, 1776, but the Declaration of Independence, like the Constitution, has "taken on new meaning" by the application of "new philosophy" and "modern authority".

At about the time when Thomas Jefferson, Benjamin Franklin, John Adams, Robert Livingston and Robert Sherman were named as a committee to write the Declaration of Independence, to accord with instructions from the Virginia Convention, which met in May, 1776, George Mason's original draft of the Virginia Declaration of Rights was a popular subject of conversation in Philadelphia and all over America. A draft of ten paragraphs of Mason's original was mailed to Richard Henry Lee by T. L. Lee from Williamsburg on May 25. It is among the *Mason Papers* in the Library of Congress at this time. The original was extended by Mason into the committee draft in eighteen paragraphs and was reported on May 27 and published in Dixon's *Virginia Gazette* of June 1. It was published in Philadelphia newspapers on June 6, June 8 and June 12 of 1776.[3] It was published and republished in newspapers and magazines all over America and in England.[4]

Jefferson, to whom was assigned the task of writing the preamble to the Declaration of Independence, took the first three paragraphs of Mason's original draft of the Virginia Declaration of Rights and rearranged and rephrased them to make a Preamble for the Declaration of Independence.

The preamble for the proposed Virginia Declaration of Rights as published stated that it was "the basis and foundation" of government in Virginia. Its first paragraph was:

> That all men are born equally free and independent and have certain inherent natural Rights, of which they cannot, by any Compact, deprive, or divest their Posterity; among which are the Enjoyment of Life and Liberty, with the Means of acquiring and possessing Property, and pursuing and Obtaining Happiness and Safety.

The Virginia Convention, before officially adopting Mason's original or the committee draft, changed the first paragraph to read:[5]

> That all Men are by Nature equally free and independent and have certain inherent Rights of which when they enter into a State of Society, they cannot, by any Compact, deprive or divest their Posterity; namely, the Enjoyment of Life and Liberty with the Means of acquiring and possessing Property, and pursuing and obtaining Happiness and Safety.

Jefferson never saw that version until he returned to Virginia long after the Declaration of Independence was adopted. Jefferson's rendition from the Mason original was:

> That all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness.

Equality Ends at Birth

So the "basis and foundation" of the first free government in America was *equality of freedom and independence*, while the Jefferson perversion was *equality at creation*. The Declaration of Independence does not say that all men are equal. It says that they were *created* equal. There equality ends.

All America thought alike on the subject in 1776. Benjamin Franklin, a few days after the Declaration was promulgated, helped to write a Declaration of Rights for the State of Pennsylvania. He copied Mason's original Virginia Declaration of Rights almost verbatim. His first paragraph was:

> That all men are born equally free and independent, and have certain natural, inalienable rights, amongst which are, the enjoying and defending Life and Liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety.

So the basis and foundation of Franklin's government was the same as that of Mason's Virginia. It was *equality of freedom and independence*.

The Massachusetts Declaration of Rights contains the phrase "All men are born free and equal ..." The *Writings of John Adams* (Volume 4, page

3. PENNSYLVANIA EVENING POST, June 6; PENNSYLVANIA LEDGER, June 8; PENNSYLVANIA GAZETTE, June 12.

4. See, as examples: MARYLAND JOURNAL, June 12; MARYLAND GAZETTE, June 13; NEW YORK GAZETTE, June 17. Among English publications it appeared in was THE REMEMBRANCER.

5. NOTE: All quotations from state bills of rights and constitutions in this article may be found in Thorpe's *Charters and Constitutions*, (1882), or *The State Constitutions*, by Kettleborough. Thorpe contains all fundamental documents back of 1880 and Kettleborough those in force in 1917. Both are arranged alphabetically as to states and Thorpe is arranged chronologically as to each state.

220) reveal that the original draft prepared by the Committee of which John Adams was chairman, in 1779, exactly copied George Mason's original with the words "That all men are born equally free and independent".

Before the Massachusetts Declaration was officially adopted John Adams embarked for France and on the twenty-ninth day of September, 1779,[6] the Convention struck out the word "equally" and the word "independent" and substituted for the word "independent" the word "equal" making the clause read as it now reads: "All men are born free and equal". John Adams was embittered by the change and, as we shall later see, had he been present it would not have occurred.[7] No other state adopted a human equality clause of any character until after 1835.

New Hampshire and North Carolina also copied Mason's original while not one of the thirteen copied from the Declaration of Independence.

When the United States Constitution was under discussion at the Philadelphia Constitutional Convention in 1787 not one delegate from any of the twelve states represented suggested that "all men are equal" either at creation or in life. On June 26, 1787, on the floor of the convention Alexander Hamilton, the patron Saint of the Republican Party, said:

> Inequality will exist as long as liberty exists. It unavoidably results from that very liberty itself.

Apparently every mind in the Convention assented, because not a word may be found in all the *Notes of Debates* to indicate that any delegate believed in the doctrine of human equality in 1787.

So far as we have found, the doctrine of human equality was not suggested by any one in the battle that raged over ratification and a bill of rights. In the South Carolina Ratifying Convention of 1788, Charles Cotesworth Pinckney, a member of the Philadelphia Convention of 1787, explained that one of the reasons why no bill of rights was adopted in Philadelphia which "... weighed particularly, with the members from this state" was that such bills generally begin by declaring that *all men are by nature born free.* Now, we should make that declaration with a very bad grace, when a large part of our property consists in men who are actually born slaves."[8] If "born free" was rejected in Philadelphia, what chance would one expect for "created equal"?

The Constitution proclaims in its preamble that it was established "to ... insure domestic tranquility ... and secure the blessings of liberty". Nowhere does it hint a purpose to insure or impose equality of men or things. The due process clause of the Fifth and Fourteenth Amendments which render life, liberty and property immune from attack except by the orderly processes fixed by law, insure that American governments may not impose equality.

The bills of rights of eighteen of the forty-eight contiguous states now use the Mason phrase, "equally free and independent" as set forth in Mason's original draft and that of Virginia's Convention of June 12, 1776. Eight prefaced the phrase with the word "born", as Mason originally wrote it.[9] Ten use the exact words of the official Virginia Convention draft, prefacing the phrase with the words "by nature", instead of the word "born".[10]

Arkansas uses the phrase "are created equally free and independent". Sixteen states have no equality clause whatever.[11]

The bills of rights of Idaho, Iowa, Kentucky and Nevada contain the clause: "all men are by nature free and equal", revealing the influence of both Mason's draft, the official draft and the Declaration of Independence.

Connecticut and Oregon put it this way: "That all men when they form a social compact, are equal in rights".

Texas says the same thing except it substituted "have equal rights" for "are equal in rights".

Florida uses Aristotle's phrase, "equal before the law".[12]

Kansas guarantees "equal ... rights", and

Wyoming "equality of ... rights".

Of the constitutions and bills of rights of the forty-eight states as of 1917 (the last available printing) only two use the equality clause of the Declaration of Independence. Those two are Indiana and North Carolina. It first appears in Section 1 of Article I of Indiana's Bill of Rights, adopted in 1851,[13] as follows:

R. Carter Pittman has practiced law in Dalton, Georgia, since his admission to the Bar in 1927. He is a graduate of the University of Georgia and of Columbia University Law School. While in law school he tutored American history. He has written many articles relating to the history of the Constitution and the Bill of Rights and has collected for publication, by any interested person or foundation (none has been found to date), thousands of pages of the unpublished writings of George Mason. He was a member of the Georgia Board of Bar Examiners until retiring therefrom in 1958.

6. JOURNAL OF MASSACHUSETTS CONSTITUTIONAL CONVENTION 1779, page 37.

7. NOTE: Both John Adams and Thomas Jefferson died on the exact date of the fiftieth Anniversary of the Declaration of Independence. A few days before his death a citizens committee of Quincy, Massachusetts, requested Mr. Adams, then more than 90 years of age, to appear at a ceremony celebrating the Fourth and honoring him. He declined attendance because of feebleness, but when urged to do so he gave a toast to be presented on the Fourth and it was presented almost within his hearing, had he been able to hear, but he was in the articles of death. The toast was: "Independence forever!" He refused to add another word.

In I WORKS OF JOHN ADAMS, 635, his grandson, Charles Francis Adams, had this to say:

> In that brief sentiment Mr. Adams infused the essence of his whole character, and of his life-long labors for his country.

8. 4 ELLIOT'S DEBATES 316.

9. Maine, Montana, New Hampshire, New Mexico, Pennsylvania, South Dakota, Vermont and Wisconsin. See Kettleborough, *supra*.

10. Alabama, California, Illinois, Nebraska, Nevada, New Jersey (Const.), North Dakota, Ohio, Virginia and West Virginia. (Nebraska, Nevada and New Jersey left out the word "equally".) *Ibid.*

11. Arizona, Colorado, Delaware, Georgia, Louisiana, Indiana. (Michigan, Minnesota, Mississippi, Missouri, New York, Oklahoma, Rhode Island, South Carolina, Utah, Washington.) *Ibid.*

12. Aristotle's *Politics*, V.

13. 2 Thorpe, *supra*, 1073.

> We declare that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness . . .

Indiana, without deeming it necessary to change the equality clause of her Bill of Rights, amended her Constitution in 1881 so as to prevent further migration of Negroes into the state and so as to deny suffrage to Negroes already in the state.[14]

The contrast between *inequality* necessarily implicit in the amendments, and the doctrine of *equality* at creation in the Bill of Rights did not seem to bother the people of Indiana at a time so recent as to be remembered by some now living.

The other state is North Carolina whose Bill of Rights of 1868, and now, recites in its first clause:[14]

> That we hold it to be self-evident that all men are created equal . . .

For decades after 1776 North Carolina's Bill of Rights proclaimed "that all men are born equally free and independent". There must surely be some explanation as to why people who had lived under maxims of George Mason since 1776 should suddenly change in 1868. The Constitution of 1868 was framed in a convention called under the reconstruction acts of Congress, by Major General Canby. It assembled at Raleigh January 14, 1868. Federal soldiers stood guard over the deliberations. The same equality clause was inserted in the bills of rights of many Southern states while the natural leaders of the white people were held at bay by federal bayonets. See for examples, the Alabama Bill of Rights of 1867, the Louisiana Bill of Rights of 1868, South Carolina's of 1868 and Florida's of 1868.[15]

As is well known by those the least familiar with American history, shortly after the federal troops were withdrawn, the white people of the South quickly expelled the carpetbaggers and subdued the scalawags and recaptured the state governments. Every one of those states, with one exception, promptly called a constitutional convention and adopted its constitution according to its own wishes in place of those imposed upon it by military might. *All struck the doctrine of human equality from their constitutions, except North Carolina.* Why North Carolina should have retained that doctrine in her Bill of Rights is a mystery. There it stands on parchment as a horrid fragment of feudal despotism imposed upon a proud and helpless people by superior force.

Lincoln on Equality

In his famous Gettysburg Address in 1863, Lincoln recited from the Declaration of Independence in this context:

> Fourscore and seven years ago our fathers brought forth upon this continent a new nation, conceived in liberty, and dedicated to the proposition that all men are created equal.

At the hour when Lincoln made that speech the Declaration of Rights of his home State of Illinois proclaimed in the words of George Mason:

> That all men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, and of acquiring, possessing, and protecting property and reputation, and of pursuing their own happiness.

Lincoln's task in 1863 was much like Jefferson's in 1776. Equally they needed a phrase that would arrest the imagination and stir emotions. When Lincoln recited from the Declaration few remembered the phrase. For near a century before 1863 it was seldom mentioned. In 1863 as in 1776 it kindled a flame that spread. It aroused emotions of sympathy. That is the primary reason for and the most powerful result of propaganda. The maxim "All is fair in love and war" is not alone for Machiavelli.

Only a year before, on August 14, 1862, President Lincoln demonstrated that he was not an equalitarian. Speaking to a large group of Negro delegates in Washington, he said:[16]

> You and we are different races. We have between us a broader difference that exists between almost any other two races.
>
> Whether it be right or wrong I need not discuss; but this physical difference is a great disadvantage to us both, as I think. . .
>
> Even when you cease to be slaves, you are yet far removed from being placed on an equality with white people. On this broad continent not a single man of your race is made the equal of a single man of ours. Go where you are treated best, and the ban is still upon you. I cannot alter if it I would. . . See our present condition—the country engaged in war, our white men cutting one another's throats, and then consider what we know to be the truth. But for your race among us there would be no war, although many men engaged on either side do not care for you one way or the other. It is better for us both, therefore, to be separated.

The Declaration of Rights of California, home state of Chief Justice Warren of the Supreme Court, is almost a verbatim copy of the official Virginia Declaration of Rights. It proclaims:

> All men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing and protecting property; and pursuing and obtaining safety and happiness.

No member of the Supreme Court can find support for equalitarianism in the fundamental laws of his home state.

The constitutions of the various republics of the world to be found in three volumes of Peaslee's *Constitutions of Nations*, reveal that the doctrine of human *equality* has been universally rejected in the constitutions of the non-Communist world. The constitutions of a few Communist countries proclaim the doctrine of human equality but none of the living constitutions of free republics, so far as we have found, now proclaim or perpetuate that doctrine. As an interesting illustration, the Constitution of the Negro republic of Liberia, adopted July 26, 1847, and still of force, which forbids the ownership of land by members of the white race, has as the first para-

14. Thorpe, *supra*.
15. *Ibid.*
16. 8 COMPLETE WORKS OF ABRAHAM LINCOLN (1905) 1.
NOTE: The predominance of persistent propaganda over seldom-told *facts* is illustrated by the popular and prevalent view of Lincoln's Emancipation Proclamation of January 1, 1863. But few know that the Proclamation applied *only* and *expressly* to ". . . persons held as slaves within any state or designated part of a state, the people whereof . . . [are] . . . in rebellion against the United States . . ."
See: *U. S. Statutes at Large*, Vol. XII, 1268, 1269.

graph of its Bill of Rights almost the exact words of the George Mason original:[17]

> All men are born equally free and independent and have certain natural, inherent, and inalienable rights, among which are the rights of enjoying and defending life and liberty, of acquiring, possessing and protecting property, and of pursuing and obtaining safety and happiness.

Thirty-one of the constitutions of the nations of the world contain Aristotle's equality clause, as does Florida, to-wit:[18]

> Equal before the law.

For all men to be "equally free and independent" they must be "equal before the law". There is no such thing as freedom and independence under men. It exists under law or not at all. The Fourteenth Amendment guaranty that no state shall deprive any citizen of "equal protection of the laws", is but another way of expressing man's inherent right to *equality of freedom and independence* under law.

The Communist Kind of "Equality"

The same concepts of equality before the law is expressed, sometimes in the words of Mason, and sometimes in the words of Aristotle, and protected by safeguards, in more than seventy of the eighty-three constitutions edited by Peaslee in 1950. Only four contain the concept of cultural, economic or social equality that Myrdal found to be the "American creed". Those four are Guatemala,[19] the Mongol Peoples Republic,[20] the Ukrainian Soviet Socialist Republic,[21] and the Union of Soviet Socialist Republics.[22]

Mongolia puts it this way: "Equal rights in all spheres of the state, economic, cultural, and sociopolitical."

Russia puts it this way: "Equality of rights of citizens of the U.S.S.R. irrespective of their nationality or race; in all spheres of economic, government, cultural, political and other public activity."

While Russia has partially succeeded in reducing most of her people to the level of degradation approaching cultural "equality", she has been careful not to interfere with the segregation practices and racial *mores* of her people. Even Russian despots have more sense than to attempt a thing like that.

In the summer of 1955 Justice Douglas and Robert F. Kennedy, an attorney for a Senate Committee, toured Russia. Mr. Justice Douglas found something he didn't fully tell.[23] Mr. Kennedy spilled it in the *New York Times Magazine* of Sunday, April 8, 1956. Here is a part:

> In every city that we visited there were two different school systems. There was one set of schools for the local children—those of a different color and race from the European Russian children. State and collective farms were operated by one group or the other, rarely by a mixture of both.
>
> Although work is supposedly being done to minimize the differences, many of the cities we visited were still split into two sections, with the finer residential areas being reserved for the European Russians. European Russians coming into the area receive a 30 per cent wage preferential over local inhabitants doing the same jobs. The whole pattern of segregation and discrimination was as pronounced in this area as virtually anywhere else in the world.

A distinguishing feature of Communism is that it never practices what it preaches. It always says one thing to distract attention as it does another.

Karl Gunnar Myrdal, whose book, *American Dilemma*, is now *corpus-juris-tertius* and "modern authority" in the Supreme Court's pseudo-socio-law, defined the "American creed", on page 4 of his book, as the "fundamental equality of all men". On pages 4 and 9 he unwittingly copied Hamilton to admit that liberty and equality cannot co-exist because, as he insists, there is an "inherent conflict" between them and "equality is slowly winning". After defining the "American creed" as "the fundamental equality of all men" he says that its

> tenets were written into the Declaration of Independence, the preamble of the Constitution, the Bill of Rights and into the constitutions of the several states. The ideals of the American creed have thus become the highest law of the land.

He must have known that the Federal Constitution and Bill of Rights and those of the states were written "to secure the blessings of liberty" and that neither says a word about securing human equality.

Myrdal is not the only one to try to make an equalitarian Marxist out of Jefferson. On one of the huge marble panels on the left as one enters the Jefferson Memorial in Washington, D. C., is a fragment of one of Jefferson's sentences. As inscribed upon the panel the words are,

> Nothing is more certainly written in the book of fate than that these people are to be free.

As written by Jefferson there was no period, but there was a semi-colon and the sentence continued:

> nor is it less certain, that the two races, equally free, cannot live in the same government. (*The Jefferson Cyclopedia*, page 816.)

That clause was deliberately left off that panel by some modern equalitarian.

On pages 12 and 13 Myrdal said:

> The worship of the Constitution . . . is a most flagrant violation of the American creed which is strongly opposed to stiff formulas.

On page 18 Myrdal finds judges and lawyers to be anathema to those indoctrinated with the "American creed" saying:

> . . . the judicial order is in many respects contrary to all their inclinations.

Naturally so *because liberty may not exist without a Constitution sustained,*

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17. 2 Peaslee, *supra*, 364.

18. Albania, Article 12; Argentina, Article 28; Belgium, Article 6; Brazil, Article 141; Bulgaria, Article 71; Burma, Article 13; China, Article 7; Costa Rica, Article 25; Cuba, Article 20; Czechoslovakia, Section 1; Egypt, Article 3; El Salvador, Article 23; Finland, Article 15; Haiti, Article 11; Ireland, Article 40(1); Italy, Article 3; Japan, Article 14; Korea, Article 8; Lebanon, Article 7; Lichtenstein, Article 31; Luxembourg, Article 11; Monaco, Article 5; Nicaragua, Article 109; Panama, Article 21; Paraguay, Article 33; Rumania, Article 16; Switzerland, Article 4; Thailand, Section 27; Turkey, Article 69; Uruguay, Article 8; Yugoslavia, Article 21.
See Peaslee, *supra*.

19. Article 23.

20. Article 79.

21. Article 103.

22. Article 123. (See *Constitutions of Nations*, alphabetically arranged, by Peaslee (1950).

23. In justice to Justice Douglas let it be said that whatever his racial views as between whites and blacks, he approves and justifies laws discriminating between whites and yellows and whites and reds, based on "racial traits".
See Douglas, WE THE JUDGES (1956) 398-399.

as written, by an emancipated judiciary selected for learning and honor. Equality may be established only where the judiciary is so prostituted that it will undermine that which its members take an oath to support.

Why the Declaration Says "Created Equal"

Why did Thomas Jefferson, Benjamin Franklin and John Adams, the sub-committee that drafted the Declaration of Independence, use a phrase so susceptible to misuse and misconstruction as "all men are created equal"? The answer to that question is partially explained in the *Writings of John Adams*. Prior to 1776 two half-demented philosophers of France, named Helvetius and Rousseau,[24] had maintained that "all men are equal", and had preached "the brotherhood of man". France was saturated with it. That philosophy had caught on with the simple-minded peasants and philosophers of France. Nothing appealed so powerfully to the ignorant French peasants as the doctrine that "all men are equal" or are brothers. To the peasant that meant that *all men are kings*. The slogan was echoed all over France: "Every man a king!" The thought didn't occur to them that if all men are kings, then all might be peasants or slaves.

The Declaration of Independence recites that its purpose was "to enable the states to levy war, conclude peace, contract alliances, establish commerce, and to do all other acts and things which independent states may of right do". Those who wrote it and those who signed it knew that it was written for the principal purpose of bringing France into the Revolution on the side of America.[25] The war had been going on for a full year. America was in an unequal struggle for life over death. Washington had been at the head of America's armies a year before July 4, 1776. Washington's task looked hopeless. Jefferson's task was to win the case for America by writing a powerful preamble that would appeal to the *hearts*—not the minds—of the French people. Since the doctrine of human equality had become a popular creed in France and since Helvetius and Rousseau were the prophets of that creed, Jefferson directed the Declaration at the hearts of the French people by declaring that "all men are created equal".

In their old age Thomas Jefferson and John Adams progressed from political rivals to bosom friends. On the thirteenth day of July, 1813, Adams' mind went back to July 4, 1776, when he and Jefferson labored together in Philadelphia. He wrote to Jefferson that day:[26]

> Inequalities of mind and body are so established by God Almighty in his constitution of human nature, that no art or policy can ever plane them down to a level. I have never read reasoning more absurd, sophistry more gross, in proof of the Athanasian creed, or transsubstantiation, than the subtle labors of Helvetius and Rousseau to demonstrate the natural equality of mankind. *Jus cuique*, the golden rule, do as you would be done by, is all the equality that can be supported or defended by reason or common sense.

About a year later, on the fifteenth day of April, 1814, John Adams wrote to John Taylor of Virginia:[27]

> Inequalities are a part of the natural history of man. I believe that none but Helvetius will affirm, that all children are born with equal genius.
>
> That all men are born to equal rights is true. Every being has a right to his own, as clear, as moral, as sacred, as any other being has. This is as indubitable as a moral government in the universe. But to teach that all men are born with equal powers and faculties, to equal influence in society, to equal property and advantages through life, is as gross a fraud, as glaring an imposition on the credulity of the people, as ever was practiced . . . by the self-styled philosophers of the French Revolution. For honor's sake, Mr. Taylor, for truth and virtue's sake, let American philosophers and politicians despise it.

Much has been falsely written and more has been mistakenly said about the influence of the human equality doctrine of the Declaration of Independence on France. We may not complete the story about America without telling the story of France.

In 1783 Benjamin Franklin translated and prepared for publication a French edition of the Declaration of Independence and all American state bills of rights and constitutions adopted up to that time, including the committee draft of Virginia's Declaration of Rights and Constitution, both written by George Mason—but not the official draft of the Virginia Declaration which Franklin did not have because it was not published in any form for distribution outside of Virginia until well into the 1800's. As is well known, that book greatly influenced the French Revolution.[28] In August, 1789, France adopted the celebrated French Declaration of Rights which copied much from those published by Franklin.

Since Helvetius and Rousseau had been the prophets of the creed of equalitarianism one would expect the French Declaration of 1789 to have asserted the doctrine that "all men are created equal" as did the Declaration of Independence. But, instead of following Helvetius, Rousseau or the Declaration of Independence, France rephrased George Mason's original and asserted as the first paragraph of her Declaration language which, when translated back into English, comes out: "men are born and always continue free and equal in respect of their rights". Her Declaration then defines "the natural and imprescriptible rights of man" as "liberty, property, security and resistance to oppression."[29]

The French Revolution teaches that liberty does not reside in the power of the majority to run the state but it lies rather in the security of a minority from the arbitrary exertion of the majority exercising the powers of the state. In that bath of blood *equality* finally became the revolutionary creed. The nobility was leveled to the middle class and finally the middle class was leveled to the proletarian. The attempt to create a classless society resulted in

24. See: 1 Thomas E. Watson's STORY OF FRANCE (1913) Vol. I, page 680, *et seq.*; Vol. II, page 18, *et seq.*, for examples of mental derangements. As fast as his wife gave birth to children, Rousseau packed them off to foundling hospitals. He would not be bothered in his zeal to preach "equality, love, brotherhood and happiness". Helvetius, the great leveller, employed twenty-four men with guns and dogs to pull down the wretched hovels of peasants along the borders of his forested estate to guard against intrusions and to guard his hated person.

25. 2 WRITINGS OF JOHN ADAMS, page 486; Becker, THE DECLARATION OF INDEPENDENCE (1940) page 129.

26. 10 WRITINGS OF JOHN ADAMS 53.

27. *Ibid.*, Volume VI, page 453.

28. See 8 WIGMORE ON EVIDENCE (3d edition) 303, quoting from the writer's *History of the Privilege Against Self-Incrimination*, 21 VIRGINIA LAW REVIEW (1935) 763.

29. Peaslee, CONSTITUTIONS OF NATIONS (1950) Volume II, page 21.

the complete suppression of liberty. Power now moved smoothly over a level plateau. The promised liberty and freedom of the French people vanished in the dead sea of equality.

The French Declaration a Perverted Doctrine

The French Declaration of August, 1789, was superseded by the French Declaration of June, 1793. The latter repealed and annulled the doctrine of George Mason and turned back to the perverted doctrine of Helvetius and Rousseau to recite that "all men are equal by nature". It defined the "natural and inalienable" rights of men as "equality, liberty, security and property".[30] At last France was ready for the motto of state originally proposed by Antoine François Momoro:

Liberté, Egalité, Fraternité

It was not until the year 1940 that that cluster of inconsistencies was stricken from the tri-color of France. It was not until September 28, 1946, that France abandoned the Declaration of Rights of 1793 and went back to that of 1789. The French National Constituent Assembly in 1946 returned to George Mason and sanity in government, with this grand statement:[31]

> On the morrow of the victory of the free peoples over the regimes that attempted to enslave and degrade the human person, the French people . . . solemnly reaffirms the rights and freedoms of man and of the citizen consecrated by the Declaration of Rights of 1789 and of the fundamental principles recognized by the laws of the republic.

The only revolutions that better the lot of man are those that revolve back to fundamental principles and proved maxims under which man has enjoyed *equality of freedom and independence.* Those are the mellowed fruits of historic experience gathered in her Gardens of Gethsemane. At last France "turned back the clock" from a despotism tempered with epigrams to a government in which powers are limited.

In his *Essays on Freedom and Power* (1948 edition), page 154, Lord Acton had this to say about the effects of the doctrine of equality in the French Revolution:

> The deepest cause which made the French Revolution so disastrous to liberty was its theory of equality . . . With this theory of equality, liberty was quenched in blood and Frenchmen became ready to sacrifice all other things to save life and fortune.

Speaking on Charter Day at the University of California on March 23, 1907, Nicholas Murray Butler, President of Columbia University, had this to say:[32]

> The political and social anarchy which Lord Acton described must be the inevitable result whenever the passion for economic equality overcomes the love of liberty in men's breasts. For the state is founded upon justice, and justice involves liberty, and liberty denies economic equality; because equality of ability, of efficiency, and even of physical force are unknown among men.

The American Revolution was kept under control by constitutions that limited power in order to preserve liberty. Virginia's Bill of Rights and Constitution were both written before the Declaration of Independence. All of the thirteen states immediately followed the example and adopted new governments. The French Revolution went out of control when it subordinated the liberties of men to the power of a government immediately responsive to equalitarian mobs. Unbridled power and liberty are in eternal enmity. As Lord Acton said, "Power corrupts and absolute power corrupts absolutely" and again, "A nation can never abandon its fate to an authority it cannot control".

When *equality* displaced *liberty* as the creed of the French Revolution, the libertarians, Turgot and Necker and LaFayette were replaced by the more radical Barnave, Condorcet and Mirabeau. In due course these were turned out by the more radical Girondins. They in their turn fell—with heads off—before the ruthless Jacobins. When the egalitarian Jacobins became supreme, the more violent devoured the others. As Camille Desmoulins, who had whipped the Paris mobs into a frenzy at the Palais Royale and the Bastille, rode trussed in a cart on his journey to lay his brilliant head under the fatal knife, he cried out to the mob:

> Don't you remember me? Won't you save me! I am Camille. It was I who started this. It was I who plucked from the tree in the garden of the Palais Royale the first green badge of Revolution!

Vain was his plea in a limitless government of equalitarian flesh! He and Danton, who had helped send the moderates to the scaffold, suffered the same fate and were in turn replaced by Marat, Robespierre, Billaud, and other extreme radicals. In his turn Robespierre too was passed on the road—the road to execution.

In *Camille Desmoulins and His Wife,* Jules Claretie [translated by Mrs. Cashel Hoey, London, 1876] at page 377, writes the epitaph of Camille—and the liberty he thought might coexist with equality:

> The liberty of which Camille dreamed, that liberty which was the daughter of Athens reared under the sky of Gaul, liberty alike elegant and affable, is still far off. Until now we have preferred equality to liberty. We have let fall the substance for the shadow. What matters it to me that I am the equal of him who is not free? What matters it to me that I share the rights of one whose right it is to grovel? But equality fascinates, like a chimera, while liberty requires a loftier worship. This is the easy seduction of the one and the eternal charm of the other.
>
> Let us then love and prefer, above all, the liberty which makes men honest and nations great. Let us love her, despite her excesses, and in order to hinder her excesses. A free people knows not the fury of nations that break their fetters and are but unchained from time to time. Slaves only flock to the Saturnalia.

When the storm of equalitarian terror passed over the horizon of French history, there were those in America interested to know what had become of those many French devotees of liberty who had fought in the American Revolution. Here is a part of what they learned: The Duc de Lauzun went to the scaffold and so did Victor de Broglie. Barbé-Marbois, a friend of Jefferson, found safety in obscurity. Alexandre de Beauharnais was beheaded. Ethis de Corny, the friend of Washington and Hamilton, lost his

30. Lieber, CIVIL LIBERTY (1880) page 532.
31. Peaslee, *supra,* Volume II, page 8.
32. 8 MODERN ELOQUENCE (1928) 54.

mind over the excesses of the Revolution before dying mad. Custine, who distinguished himself at Yorktown, was sent to the scaffold. Arthur Dillon went to his death with these words on his lips: "*Vive le Roi!*". D'Estaing, the great French admiral, whose life story was told by Alexander Lawrence in *Storm over Savannah* (University of Georgia Press, 1951) was guillotined. LaFayette, shocked and heart broken by the excesses of the Revolution, left France to be cast as a prisoner of state into a dungeon at Olmütz. Charles de Lameth, who was wounded at Yorktown, fled the country. So did Alexandre and Theodore de Laméth. Montesquieu, the grandson of the great political philosopher, was forced to flee for safety. The Comte de Rochambeau was saved from the guillotine only by the fact that his son was an outstanding leader in the French Army. This is only a part of the story as to a part of those who helped America win its freedom. It is briefly told by Lewis Rosenthal in *America and France* (1882) page 271, *et seq.* It is more fully told in the *General* and *Universal Biographies of France.*

John Adams was in France during her Revolution and knew this story first hand when he wrote to John Taylor in 1814 about the doctrine of equality:

> For honor's sake, Mr. Taylor, for truth and virtue's sake, let American philosophers and politicians despise it.

It is no wonder that he described that doctrine as a "gross fraud" and a "glaring imposition". James Madison, Charles W. Elliot, Henry James, Edmund Burke, John Morley and hundreds of others have exposed the specious thing, but it lives on.

"*Social Equality*"— *A Communist Tool*

At the Eighth Congress of the Communist International held in Moscow in 1928, methods to be used to destroy true representative government by free people were fully discussed. It has been revealed over and over again[33] that advocacy of "social equality" among diverse races was there agreed upon as the surest method for the destruction of free governments in America and elsewhere. Since class hatred is the sure-fire Communist weapon to bring about internal strife and finally revolution, Moscow adopted the slogan, "all men are equal" for the contest that has already done more harm to America than can ever be repaired.

The sheer weight and effectiveness of the Communist propaganda is appalling. It is in full swing in Africa. The January, 1960, issue of the *South African Observer*, published in Cape Town, S. A., has an editorial entitled "*The Heresy of Human Equality*". The first paragraph tells a story that is old in America:

> The most mischievous falsehood in Communist propaganda released in Africa is that all men are born equal.

It is *equality of freedom and independence* that gives unto man his opportunity to be rich or poor or to be good or bad. Equality of men leaves no choice, because if all men are equal by nature or inherently there can be no differences and no distinctions. All have an equal right to stand at the judgment bars of God and man—but all are not entitled to the same judgment. Virtue and depravity are not entitled to the same rewards on earth or in Heaven.

It is inequality that gives enlargement to religion, to intellect, to energy, to virtue, to love and to wealth. Equality of intellect stabilizes mediocrity. Equality of wealth makes all men poor. Equality of religion destroys all creeds. Equality of energy renders all men sluggards. Equality of virtue suspends all men without the gates of Heaven. Equality of love stultifies every manly passion, destroys every family altar and mongrelizes the races of men. Equality homogenizes so that cream does not rise to the top. It puts the eagle in the hen house so that he may no longer soar. It subverts civilization by encouraging the Hottentot to claim equal footing with the cultured and intellectual in any scheme of social administration.

Equality of freedom cannot exist without inequality in the rewards and earned fruits of that freedom. There can be no equality of freedom, without leaving to all men a free and lawful choice of the "means of acquiring and possessing property, and pursuing and obtaining happiness" as Mason had it when Jefferson, like the gypsy, first defaced and then claimed as his own.

It is inequality that makes "the pursuit of happiness" something more than a dry run or a futile chase. It is inequality that makes the race. It is the father of every joy and the giver of every good gift. More than 2000 years ago Aristotle said: "Equality may exist only among slaves". Slavery is the end result of levelling. In the fruitless effort to achieve equality short of slavery the peaks must be bulldozed into the valleys to make a level plain. Such may be done only through the process now called "social engineering" which holds that the end justifies the means. Those means must ever be force, restriction, terror and a complete loss of liberty.

Equality may be imposed only in a despotism. Equality beyond the range of legal rights is despotic restraint. It is nowhere sought to be imposed except in the communistic sewers of slavic slavery. As Francis Lieber pointed out in his great work on *Civil Liberty* (page 334) 100 years ago: "Equality absolutely carried out leads to communism."

The prophesy is now being realized in America. It is *not* the "American creed". It is the creed of Marxism and the come-on of Communism.

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33. As an example, the March, 1956, issue of the NATIONAL REPUBLIC MAGAZINE carries an excellent article on the subject.

Judicial Review:

Usurpation or Abdication?

Mr. Palmer points out that the doctrine of judicial review is perhaps the most striking feature of American law to British eyes. Although it has its antecedents in Bracton and Coke, it was John Marshall who established it on this side of the Atlantic where it has now become fundamental to our jurisprudence. Mr. Palmer considers some of the problems that arise in a society where judges may hold the balance of power in policy-making.

by Ben W. Palmer • *of the Minnesota Bar (Minneapolis)*

AMERICAN LAWYERS can say to members of the English Bench and Bar: a common love, a shared love, means a mutual love. We share in, we take pride in, the glories of a common language. We revel in the richness of its vocabulary, in its infinite variety, in its words trailing clouds of glory from the Greek of Plato, Aristotle and Homer, the Latin of Cicero and Quintilian and Vergil, through the rugged and homely Anglo-Saxon, the words of Chaucer and of Spenser's *Faerie Queene*, the Indian vocabulary of Kipling; the technical words of our craft; words that lend themselves to every sinuosity of thought; the words with which we think; the words, English words, that are the very fibre of our being.[1]

Our hearts have thrilled at Milton and Shakespeare, Keats and Shelley, Browning and Tennyson, Fielding, Defoe and Smollett, Dickens and Thackeray, Pepys, Sam Johnson and Macaulay, Conrad and Hardy. We stood imaginatively beside you on St. Crispin's Day at Agincourt; when the barons won the Great Charter from John at Runnymede; beside Bracton when he said that the King ought to be under God and the law. We were there when Lord Coke at peril of disembowelment and the Tower stood manfully against the divine right of kings,[2] when Burke pleaded for conciliation with America, and when Wellington stopped the tyrant of Europe at Waterloo, and Nelson at Trafalgar.

We have thrilled at the shrill sweet treble of your fifes upon the breeze, the song on your bugles blown round the world, where you kept the keys of teeming destinies. We saw your "Thin red line of 'eroes" and the finest hour, the hour of blood and sweat and tears of that sceptered isle, that sea-girt land, that water-walled bulwark against infections and evil philosophies of government and the hand of war. We and our sons stood with you and our Canadian brothers against the aggressors in two World Wars as we stand today with you for peace and justice throughout the world. And perhaps as important as all, our hands are dyed with the same dye of a common endeavor and a common daily task:[3] minimizing the frictions of a complex society; making law representative of reason and not of force as the instrument of mere expediency and power; inducing men to live within and by the law; securing for all men equality before the law; achieving justice between men and men, between governments and men and among the nations of the earth.

We glory in our common ideals and techniques, our common legal history and traditions from the Year Books down, the broadening precedents and "the Flood of British freedom, which to the open sea of the world's praise, from dark antiquity hath flowed, 'with pomp of waters unwithstood' "; and in our common democracies.

But there yawns between us the abyss of a fundamental dichotomy; an omnipotent Parliament on the one hand, and a government restrained by a written Constitution on the other. And important as the keystone of the arch are the doctrine and practice of judicial review.

By judicial review we here mean, not the determination by the courts whether or not administrative actions

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1. See Palmer, *The Right Use of Words*, 34 A.B.A.J. 368 (May, 1948); *Language and the Law*, 35 A.B.A.J. 559 (May, 1949).

2. Palmer, *Edward Coke, Champion of Liberty*, 32 A.B.A.J. 135 (March, 1946).

3. For some common interests see Palmer, *The Lawyer and the Poet*, 35 A.B.A.J. 375 (May, 1949); *The Historian and the Lawyer*, 32 A.B.A.J. 530 (September, 1946); *What Lawyers Wear*, 33 A.B.A.J. 529 (June, 1947); *Fees—Prohibited and Elusive*, 38 A.B.A.J. 1003 (December, 1952); *Legal Fictions and Red Room Wine*, 38 A.B.A.J. 23 (January, 1952); *Holidays from Law*, 32 A.B.A.J. 817 (December, 1946); *Liberty and Order*, 32 A.B.A.J. 731 (November, 1946); *Wormser on Law*, 36 A.B.A.J. 468 (January, 1950); *The Ancient Roots of the Law*, 35 A.B.A.J. 633 (August, 1949); *The Ancient Roots of the Law*, 35 A.B.A.J. 744 (September, 1949); *Vestigial Remnants in the Law*, 35 A.B.A.J. 981; (December, 1949); *The Vestigial Sheriff*, 36 A.B.A.J. 367 (May, 1950); *The Coroner as a Vestigial Remnant*, 36 A.B.A.J. 920; (September, 1950).

are lawful, but rather the power of courts, particularly the United States Supreme Court, to declare legislative acts unconstitutional.[4]

For a brief moment three hundred and fifty years ago it looked, at least in retrospect, as if the whole world of English law would come to turn upon the axis of a principle analogous to judicial review. For no one can forget the famous phrase of Lord Coke in *Dr. Bonham's Case:* "When an act of parliament is against common right and reason—the common law will controul it and adjudge such act to be void."[5]

Coke's principle, again forbidding a man to be a judge of his own case, was followed by Chief Justice Hobart in *Day* v. *Savadge*,[6] and the principle restated in *Lord Sheffield* v. *Radcliffe*.[7] Coke, however, was later overruled and in 1871 his principle was categorically denied. The court said, "We sit here as servants of the Queen and the legislature."[8]

And so the great stream of constitutional theory and practice in England and in America diverged and each went its separate way. And today we attempt some appraisal of judicial review in America and some forecast of its future.

The Bases of Judicial Review

We begin with a consideration of its bases. These are to be found in constitutional history and theory, in the language of the Constitution, and in the logic of Marshall.

The higher law background of judicial review[9] is to be found in theories of an immutable, everlasting natural law, binding on all men and races and governments, based on reason, the concept of an ordered universe and the essential unity of men as rational animals, social or political beings. This Stoic concept of natural law, strengthened and profoundly influencing Roman law because of the influence of Cicero, had its kinship with Christian principles of the equal preciousness of the souls of men. Strengthened by revelation, written as it was said in the heart of man, by the finger of God, higher Law dominated the Middle Ages and emperors and kings were subject to its rule.[10]

Our indebtedness to Coke for *Dr. Bonham's Case*, used by Otis in the polemics that preceded the colonial appeal to arms, is increased because of Coke's creation of that great salutary myth—the myth of Magna Charta—as superior to statutes. To Coke was added the natural law theory of Grotius, the theories of Locke in defense of the inalienable rights to life, liberty and property, and Montesquieu's theory of the separation of powers.[11]

When we come to the specific history of judicial review there has been much debate as to whether there were true and generally accepted state or colonial precedents prior to the Federal Constitutional Convention. There has also been much debate as to whether the members of the constitutional and ratifying conventions understood that the courts would have the power to declare acts unconstitutional.[12] These debates are too extensive to be summarized and summary seems unnecessary. Whatever be the historical truth in the eyes of Omniscience and to what extent it may further be unveiled, the question has become an academic one of concern only to those in the ivory tower. If the intent to confer the power be established at some later date to have been a myth, the myth will have served its purpose. For judicial review, everyone will agree, has become so much bone of the bone and flesh of the flesh of American law and life that it will not be eliminated. Whether or not there was usurpation is now immaterial.

The language supporting the courts' power is so well known and the logic and expression of Marshall in *Marbury* v. *Madison* so familiar that we may quote Corwin's statement that Marshall's "compact presentation of the case marches to its conclusion with all the precision of a demonstration of Euclid".[13] Says William Anderson, formerly President of the American Political Science Association, "On these points the decision was so cogent, clear and emphatic that its reasoning has never been improved upon."[14] The extraordinary quality of the decision lay in its timeliness and in Marshall's boldness and statesmanlike vision in

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4. For judicial review elsewhere see McWhinney, *Judicial Review in the English Speaking World* (Toronto, 1956) 6 JOURNAL OF PUBLIC LAW 465-508 (Fall, 1957); David Deener in 46 AM. POL. SCI. REV. 1079-1099 (December, 1952).

5. 8 Co. 118a (1610).

6. Hobart, 85 (K.B. 1614).

7. Hobart, 334a, 346 (K.B. 1615).

8. *Lee* v. *Bude and Torrington Junction Ry.*, L.R. 6 C.P. 576, 582 (1871), and see Theodore F. T. Plucknett, *Bonhams' Case and Judicial Review*, 40 HARV. L. REV. 30 (1926). Reprinted in SELECTED ESSAYS IN CONSTITUTIONAL LAW, 67-100 (Chicago, 1938).

9. Corwin's essay in 42 HARV. L. REV. 146, 365 (1928-1929), reprinted in 1 SELECTED ESSAYS IN CONSTITUTIONAL LAW 1-67, is a classic that must forever loom up in the foreground of any discussion of judicial review.

10. In addition to Corwin see Charles Grove Haines, THE REVIVAL OF NATURAL LAW CONCEPTS (Cambridge, Massachusetts, 1930) 28 *et seq.*; John Bowle, WESTERN POLITICAL THOUGHT (London, 1949); D'Entreves, MEDIEVAL CONTRIBUTIONS TO POLITICAL THOUGHT (New York, 1959); McIlwain, THE GROWTH OF POLITICAL THOUGHT IN THE WEST (New York 1932); Otto Gierke, POLITICAL THEORIES OF THE MIDDLE AGE, translated by Frederic William Maitland (Cambridge, England, 1938); R. W. and A. J. Carlyle, A HISTORY OF POLITICAL THEORY IN THE WEST, 5 Vols. (3d ed. Edinburgh, 1935); Heinrich A. Rommen, THE NATURAL LAW (1947); McIlwain, ANCIENT AND MODERN CONSTITUTIONALISM (Ithaca, 1947); Robert N. Wilkin, *Natural Law: Its Robust Survival Defies the Positivists*, 35 A.B.A.J. 192 (March, 1949); Harold R. McKinnon, *The Secret of Mr. Justice Holmes*, 36 A.B.A.J. 261 (April, 1950). See Palmer, *Hobbes, Holmes and Hitler*, 31 A.B.A.J. 569 (November, 1945); *Defense Against Leviathan*, 32 A.B.A.J. 328 (June, 1946); *Reply to Charles W. Briggs*, 32 A.B.A.J. 635 (October, 1946); *Totalitarian Democracy*, 37 A.B.A.J. 199 (March, 1956); *The Totalitarianism of Mr. Justice Holmes*, 37 A.B.A.J. 809 (November, 1951); *Natural Law in a Creative and Dynamic Age*, 35 A.B.A.J. 12 (January, 1949). On the Emperor, see Palmer, *What the World Owes to Roman Law*, 45 A.B.A.J. 1149 (November, 1959).

11. THE SPIRIT OF THE LAWS, Book XI; Madison in No. 47 of THE FEDERALIST. On separation of powers see Palmer, *Government by Decree*, 36 A.B.A.J. 923 (November, 1950).

12. A good illustration has been the debate over William W. Crosskey's POLITICS AND THE CONSTITUTION, 2 Vols. (Chicago, 1953) in 48 AM. POL. SCI. REV. 63 (March, 1954); 49 *ibid.* 64 (March, 1955); 50 *ibid.* 43 (March, 1956); 40 AM. HIST. REV. 907 (July, 1955); 288 ANNALS AM. ACAD. POL. AND SOCIAL SCIENCE 159 (July, 1953). For list of articles see 49 AM. POL. SCI. REV. 64 (March, 1955).

13. JOHN MARSHALL AND THE CONSTITUTION, Chronicles of America Series 67 (New Haven, 1919).

14. THE NATIONAL GOVERNMENT OF THE UNITED STATES 303 (New York, 1946) but he has some criticism.

Charles Grove Haines in THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT AND POLITICS 1789-1835 (Berkeley, 1944) questions Marshall's assumptions, refers to his "peculiar type of legal logic" and the "mythical and fictional character of his judgment—the presumed inescapable logic leading to the American doctrine of judicial review will not bear critical scrutiny", pages 16, 23.

C. Herman Pritchett in THE AMERICAN CONSTITUTION, New York (1959) says that Marshall "professed to believe that the statutory provision conflicted with the constitutional provision. Of course, this was preposterous and Marshall knew it" (page 139). He speaks of a "bland assumption" by Hamilton, page 139, and Marshall but admits that "few now find such arguments against judicial review convincing", page 141.

using so trifling a case as a pretext for so monumental a decision.[15]

As Cardozo said, "He gave to the Constitution of the United States the impress of his own mind; and the form of our constitutional law is what it is because he moulded it while it was still plastic and malleable in the fire of his own intense convictions."[16]

The higher law background of the Constitution is important not only for an understanding of the Constitution but for its preservation. Outwardly and formally there was little difference between the Roman Republic—the *Senatus Populusque Romanus*—and the empire under Caesar Augustus or Caligula. The outward façade of the French monarchy under Louis XVI concealed anarchy within. Queen Elizabeth II in legal theory is much like the Great Elizabeth of Armada days.[17] The American Constitution has been profoundly changed by practices and the party system and by judicial decisions without formal amendments. Must we now guard ourselves against being compelled to say of the Constitution, "How does beauty steal from [its] figure and no pace perceived?"

Ignorance of the higher law background of the Constitution, misunderstanding of that background, disagreement with its principles and underlying philosophy, its displacement by a pragmatic, relativist, skeptical, anti-metaphysical philosophy of expediency, of conformity to what is conceived to be the popular will, the spirit of the times or the progress of science and society, have opened the doors to erosion of the Constitution itself. It cannot stand, it cannot remain a bulwark of liberty and an instrumentality of justice if its principles and underlying philosophy be disbelieved and discredited.

Scope of Judicial Review Has Been Broadened

The potential scope of judicial review has been immensely broadened in recent years. We still have the ideal of a government of laws and not of men. But mechanical jurisprudence has gone with the wind. Even those who worshipped at its shrine and canonized John Marshall for his "judicial statesmanship" finally admitted to themselves that there could have been no "statesmanship" had he been as much of an automaton as a phonograph needle or the mechanism of a slot machine.[18] His greatness lay in making the law, or at least in making the Constitution live and not merely in finding the law. If he was the law speaking, he was the law speaking persuasively and convincingly and for many with a logic irresistible.

The judicial attitude toward the judicial function and toward the Constitution has changed. Many justices now consciously legislate. It is true that they do so only interstitially within the contours of the Constitution. But those contours are vague because the Constitution, designed for the ages, wisely has its calculated generalities. And these are purposely preserved by a certain degree of calculated judicial imprecision. A justice's concept of his function is inescapably affected by his knowledge of or opinion as to judicial functions in the past. He may realize that all revolutions are not necessarily made dramatically manifest by Boston tea parties or falling Bastilles. He may remember Jefferson's warning that the judiciary are the miners and sappers of the Constitution. He may know that they work by accretion and reliction and not by avulsion. But they work. Perhaps during the last twenty-four or more years he and others failed to note any change in the coast line along the waters of the law. And then suddenly a new continent swam into his and their ken. He and others realized that there had been a revolution by judiciary.

Without constitutional amendment there has been a great shift of power from the states to Washington. The so-called "sovereign" states have now become for most practical purposes merely geographical or political subdivisions of the Union. And there has been a vast increase in the powers of government, both state and federal, over people's activities, particularly those that are economic.[19]

If judges in the past had exercised their muscles of discretion, why should not a justice of the present day flex his, especially if he thinks that the work of his predecessors was salutary? In doing so, he, like they, would take advantage of the newer flexible logic of consequences that was to take the place of the cribbing and confining logic of the syllogism, since Aristotle was passé. Furthermore he would recognize the fact that the materials in the judicial brew were not all logic. There was experience and prophecy, judgment and the weighing of alternative policies and legislative programs. Lip service would be given to the doctrine that with the wisdom or folly of legislation the courts have no concern. But wisdom or folly came in through the back door of the Brandeis brief. And judicial notice enabled the justices to base their conclusions and justify them by reports and surveys or what might be called "polls", governmental or private, accumulated masses of mingled fact and opinion in the writings of professors and publicists, political scientists, economists, sociologists, psychologists, historians, businessmen, bankers, labor leaders and politicians. And *stare decisis* was not to stand in the way of the justices' achieving their hearts' desires.

Nor was the Constitution regarded as it long had been. Up to the turn of the century and for some time afterwards, lawyers and judges generally conceived the Constitution as something sacrosanct because it represented the deliberate choice of the sovereign people, the accumulated wisdom of the race in solving the perennial problem of the reconciliation of liberty and order.[20] It embodied immutable principles of everlasting justice and reason. The Constitution was to be master of the court. Its mandates were to be scrupulously obeyed regardless either of the views of individual judges or of what they thought popular or legislative majorities might desire. They were to find the major premises of their syllogisms in the words of the Constitution and rigorously follow through to inexorable, logical consequences. They were to declare those consequences though the heavens fell.

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15. Palmer, MARSHALL AND TANEY, STATESMEN OF THE LAW 80 (Minneapolis, 1939).
16. THE NATURE OF THE JUDICIAL PROCESS 169 (New Haven, 1921).
17. See Palmer, *Legal Fictions and Red Room Wine*, 38 A.B.A.J. 23 (January, 1952).
18. Palmer, MARSHALL AND TANEY, *supra*, 14-39.
19. Palmer, *Revolution by Judiciary*, 27 AMERICAN INTERPROFESSIONAL INSTITUTE QUARTERLY 19 (February, 1952).
20. Palmer, *Liberty and Order: Conflict and Reconciliation*, 32 A.B.A.J. 731 (November, 1946).

Judicial Change and Pragmatism

Then the judicial attitude changed. Philosophies changed. The belief in absolutes disintegrated. It succumbed to a growing pragmatism so characteristic of America, a pragmatism which ignored philosophy, or consciously made it the servant, rationalizer and justifier of desires, truth relative, truth for you that which worked for you though contradictory to my truth that worked for me.[21] And there were circumambient, almost irresistible skepticism, confusion, and doubt in an age of world-wide social, economic, political, racial, educational, philosophical, religious and moral turmoil. When the world was turned upside down how were the old moral and philosophical bases of the American constitutional system to stand? Too often, some said, expediency became the god of judicial idolatry just as it had been of the politician and of some statesmen.

The abstract artist of today achieves a measure of freedom in the freeing of the subjective from the confining limitations of the representation of the object. So does a justice have a greater freedom of action, a wider field of discretion, if he be a pragmatist, a relativist, a worshipper of tolerance to all ideas whether good or evil, without preference to either, rather than one with a coherent, consistent body of principles, at least tinctured with perdurable absolutes.

The pursuit of expediency was expedited, facilitated and justified by a newer prevailing judicial attitude toward the law and the Constitution.

Accepting the philosophy of Mr. Justice Holmes or some of its implications, his words as Holy Writ, tending to follow what was conceived to be a popular mandate to President and Congress by a people speaking with the voice of God, succumbing to a totalitarian trend,[22] influenced unconsciously by agitations against the Constitution as a reactionary if not conspiratorial document, and later by, partly disavowed and discredited, Beard's famous economic interpretation of the Constitution,[23] adopting a point of view as old as Thrasymachus and Callicles and advanced by Marx and Engels, law came to be regarded as meaning the embodiment of force or will or command. And this was believed right. Law need not be representative of principles of natural law or be an ordinance of reason as St. Thomas Aquinas said. And the Constitution somewhat discredited was not to stand in the way of the law. The Constitution was to be so construed with latitudinarian bias that federal legislation, certainly if economic, was never to be declared invalid.

As the attitude changed toward the law, so it did with respect to the Constitution. The Court was to be its master, not its servant. What the intentions of the makers and ratifiers of the Constitution were, even if they could be determined—and it was easy to say they could not—was to give way to the intentions of the present day. Just whose intentions these were and how they were to be determined, by poll or otherwise, was not set forth.[24] Though perhaps not a brooding omnipresence in the sky perhaps it was a *Zeitgeist*[25] or a popular will known only to the justices and locked in the secrecy of their breasts. At any rate, though not explicitly avowed, judicial review was to make the Court a continuing constitutional convention without, however, the need of any popular ratification by convention or otherwise.

And so the wheel has come full circle and we hear the cry of "judicial usurpation" and of "judicial oligarchy". How was that to be forestalled? The Court, beginning with Marshall, has recognized the delicacy of these operations of judicial review, the danger of collision with the executive or legislative departments, its dependence on prestige and the support of public opinion since it has neither purse nor sword. So it is said to wait for cases. It has refused to give advisory opinions, to decide abstract and political questions. And it has developed certain rules[26] under which, as it has said, "it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision".

The Court will not pass upon the constitutionality of legislation in a friendly, nonadversary proceeding; "anticipate a question of constitutional law broader than is required by the precise facts to which it is to be applied"; "pass upon constitutional questions although properly presented to it by the record, if there is also present some other ground upon which the case may be disposed of"; "pass upon the validity of a statute upon complaint of one who failed to show that he is injured by its operation" or "at the insistence of one who has availed himself of its benefits". Furthermore, "even if a serious doubt of constitutionality is raised" the Court "will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided".

Most important is the presumption of constitutionality. In 1798 Mr. Justice Iredell said that the power to declare an act unconstitutional should be used only "in a clear and urgent case".[27] In 1800 it was said that there must be "a clear and unequivocal breach of the constitution, not doubtful and argumentative implication".[28] In 1819 in *Dartmouth College*, Marshall said: "It is but a decent respect due to the wisdom, the integrity and the patriotism of the legislative body by which any law is passed to presume in favor of its validity, until its violation

21. On pragmatism see Palmer, *Background for Dissensions*, 34 A.B.A.J. 1092 (December, 1948). *The Natural Law and Pragmatism*, 1 UNIVERSITY OF NOTRE DAME NATURAL LAW INSTITUTE PROCEEDINGS 30-64 (Notre Dame, 1949) (also in NOTRE DAME LAWYER, March, 1948); *The Natural Law and Pragmatism*, THE CATHOLIC LAWYER (April, 1956); MAN AND LAW, TRADITION AND PROSPECT (Georgetown University Press, 1949, 36-43); PROCEEDINGS — AMERICAN CATHOLIC PHILOSOPHICAL ASSOCIATION 1946 and 1950. See also Reuschlein, JURISPRUDENCE, ITS AMERICAN PROPHETS 374-379 (1951).

22. Palmer, *Totalitarian Democracy: Is Popular Sovereignty Becoming a Despot?* 37 A.B.A.J. 199 (March, 1951); *Defense Against Leviathan*, 32 A.B.A.J. 328 (June, 1946).

23. Charles A. Beard, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (New York, 1914), Robert E. Brown, CHARLES BEARD AND THE CONSTITUTION (Princeton, 1956).

24. See William Anderson, *The Intention of the Framers*, 49 AM. POL. SCI. REV. 340-352 (June, 1955).

25. "In every court there are likely to be as many estimates of the 'Zeitgeist' as there are judges on the bench." Cardozo, THE NATURE OF THE JUDICIAL PROCESS 174 (New Haven, 1921). Professor Pritchett says that with reference to Watkins "what the Court has done, it seems, is to try a little psychological warfare on Congress, to see whether it cannot be frightened or shamed into taking a more responsible view of its powers", 3 S. D. LAW REV. 76 (Spring, 1958); at page 63, he says, in discussing the *Brown* segregation case, "The American Constitutional system has given the Supreme Court the responsibility of acting" as a kind of national conscience.

26. *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288 (1936). On political questions, see W. J. Wagner in 32 TEMPLE L. QUAR. 135-136 (1959).

27. *Calder* v. *Bull*, 3 Dall. 386, 399.

28. *Cooper* v. *Telfair*, 4 Dall. 14, 19.

of the constitution is proved beyond all reasonable doubt."[29] It must be noted, however, that in the decade before 1949 the doctrine of the preferred position of liberties guaranteed by the First Amendment was developed. The presumption of innocence was not to attach to legislative limitations on such liberties, and statutes infringing them were said to be "infected with presumptive invalidity".[30]

And finally there is the so-called doctrine of "judicial self-restraint". In 1904 Holmes speaking for a unanimous Court said: "It must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the Court."[31] In 1933 Mr. Justice Stone dissenting from invalidation of the Agricultural Adjustment Act said: "While unconstitutional exercise of power by the executive and legislative branches of the government is subject to judicial restraint, the only check upon our own exercise of power is our own sense of self-restraint."[32]

In 1932, Frankfurter wrote: "The duty to abstain from adjudicating, particularly in the field of public law, may arise from the restricted nature of the judicial process. The specific claim before the Court may be enmeshed in larger public issues beyond the court's reach of investigation, or a suitable remedy may exceed judicial resources. Such a solution even though disguised as a case, eludes adjudication. To forego judgment under such circumstances is not abdication of judicial power, but recognition of rational limits to its compliance. Law is only partly in the keeping of courts; much must be left to legislation and administration."[33]

As to waiting for cases there is the question of timing. This calls for judicial statesmanship. For the Court is or should be conscious of the fact that certain things cannot be accomplished by law in the face of opposition by great masses of people, indeed in the face of mass inertia. Individuals, if not too numerous or publicly supported may be dealt with by fine or imprisonment or death. But great social, economic and political questions cannot be solved by the courts in the guise or pretext of judicial decisions on narrow or solely legal questions.

Dred Scott[34] was the colossal failure. It was because only the arbitrament of war could solve the problem of slavery in the states and territories. Although it has been said by some that the 1954 decisions in the Segregation Cases[35]—the most momentous since Dred Scott—were timed with wisdom after a cautious approach beginning in 1938[36] and with cases in 1948[37] and 1950,[38] it remains to be seen, whether or not in the long run in the face of Southern opposition and massive resistance, *Brown* may be in the category of *Dred Scott* so far as its effectiveness is concerned.[39]

It has been said that one of the restraints on judicial review and one of the reasons for its general acceptance has been that the Court does not give advisory opinions, decide political questions, must wait for cases.

It does not give advisory opinions but such would be much less explosively dangerous to the prestige of the Court than the determination of political questions which many Southerners claim segregation to be. Furthermore real decisions that the courts may attempt to enforce with all the machinery of the Federal Government including the Armed Forces may be given by granting certiorari. And in the Segregation Cases the Court "took the highly unusual step of inviting the filing of a petition for certiorari before judgment in the court of appeals in the District of Columbia case".[40]

There have been decisions of the Court with dissents in which anyone reading between the lines could be reasonably sure that certiorari would be granted even though there was no formal, explicit invitation of record from the Court.

Ben W. Palmer practices law in Minneapolis. He is a graduate of the University of Minnesota and received his law degree *cum laude* from that school in 1913. He is a past President of the Hennepin County Bar Association and the author of *Courtroom Strategies*, published last year.

Franklin D. Roosevelt was said to have an uncanny and remarkable faculty for timing, though critics of his court-packing scheme do not admit this to have been a conspicuous example of his skill. Such a skill may be a mark of judicial statesmanship: a lack of it, of judicial ineptitude or folly. Did the Court go wrong on its timing when it struck down such important New Deal legislation as the National Recovery Act[41] and the Agricultural Adjustment Act?[42] Was its timing right when with one exception from 1946 to *Watkins* in 1957 it consistently refused to grant certiorari in cases presenting real issues as to rights of witnesses to refuse to answer questions such as those by the House Committee on Un-American Activities?[43] Was its timing wrong in *Watkins*[44] and *Yates?*[45] Did general

29. 4 Wheat. 518 (1819).
30. Frankfurter in *Kovacs* v. *Cooper*, 336 U. S. 77, 90 (1949). For Stone's famous footnote said to have initiated the "preferred position doctrine"—see *United States* v. *Carolene Products Co.*, 304 U. S. 144 (1938). Further see *Schneider* v. *Irvington*, 308 U. S. 1477 (1939); *Murdock* v. *Pennsylvania*, 319 U. S. 105 (1943); *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624 (1943); *Pennekamp* v. *Florida*, 328 U. S. 331 (1946). The dissent by Chief Justice Stone is in *Jones* v. *Opelika*, 316 U.S. 584 (1942), and by Frankfurter in *Bridges* v. *California*, 314 U. S. 252 (1941). See also 42 Am. Pol. Sci. Rev. 42 (February, 1948).
31. *Missouri, Kan. & Tex. R. Co.* v. *May*, 94 U. S. 267.
32. *U. S.* v. *Butler*, 297 U. S. 1.
33. See his Mr. Justice Brandeis; Palmer, *Judicial Self-Restraint or Abdication*, 34 A.B.A.J. 761, 762 (September, 1948).
34. *Dred Scott* v. *Sandford*, 60 U. S. (19 How.) 393 (1857).
35. *Brown* v. *Board of Education*, 347 U. S. 543.
36. *Missouri* ex rel. *Gaines* v. *Canada*, 305 U. S. 337.
37. *Sipuel* v. *Board of Regents*, 332 U. S. 631.
38. *McLaurin* v. *Oklahoma State Regents*, 339 U. S. 637; *Sweatt* v. *Painter*, 309 U. S. 629.
39. On the "Thirty Years' War" see Palmer, *Resolving the Dilemma*, 45 A.B.A.J. 39 (January, 1959).
40. Malcolm T. Dungan in 6 Journal of Public Law 373 (Fall, 1957).
41. *Schechter Poultry Corp.* v. *U. S.*, 295 U. S. 495 (1935).
42. *U. S.* v. *Butler*, 297 U. S. 1 (1936).
43. C. Herman Pritchett in 3 S. D. Law Rev. 71 (Spring, 1958).
44. *Watkins* v. *U. S.*, 354 U. S. 171 (1957).
45. *Yates* v. *U. S.*, 354 U. S. 298 (1957).

popular approval of its disapproval of President Truman's seizure of the steel mills indicate that in that case its timing was right?[46]

In view of certain practices the theory of a passive court that sits back and waits for litigants has little force today.

Whether or not the Court is failing in its duty to protect constitutional rights is hard to determine. This depends upon the quality of its work and its efficiency or speed. Quality depends upon (1) the wisdom of taking or not taking jurisdiction of a given question at a specific time and (2) the quality of its decision if it does take jurisdiction. Whether it should decide involves the question of "usurpation" or "abdication". Unfortunately for the cause of objective truth it is almost impossible for the critic to answer this question without being affected or controlled in his approval of the Court's action by his convictions and emotions. If the Court decides as he thinks right, then he concludes usually that the Court rightly and constitutionally took jurisdiction. If he dislikes the result intellectually and emotionally the Court has usurped power. The School Segregation Cases are classic examples of the difficulty of objective appraisal.

The quality of the decision is also hard to judge even in an emotional vacuum. In content a point argued may not be considered in the opinion and if deemed important by the critic the opinion will be condemned for the omission. That omission, however, may have been necessary in order to secure a majority or unanimous vote. So also as to style. A face-saving clause may be slipped into a treaty. So, too, an ambiguous word or muddy phrase in a statute may not be the result of careless or inept draftsmanship. It may have been deliberately contrived for a conference committee of the House and Senate or of party leaders to secure passage of an act by making it to some extent mean all things to all men. The same thing may happen to bring justices of diverse views to support the same decision and opinion. The opinion writer may know very well how unclear he has been.

Is the Court Overworked?

Even if agreement could be reached as to the quality of the Court's opinions[47] the question would remain whether there is the justice delayed that is justice denied.[48] This goes back to the question of timing in certiorari and is also related to the question whether the Court is so overworked that it cannot grant more certiorari. Professor Hart says that "the court has more work to do than it is able to do in the way in which the work ought to be done".[49] Arnold says, "the plain and simple fact is that they are not overworked."[50] Even if we could agree that they are overworked two questions would remain: (1) Why are they overworked and (2) What can be done about it?

One test of overwork was congestion of the calendar, the chief cause for substituting certiorari for an absolute right of appeal in the Judiciary Act of 1925.[51] This argument was advanced when Roosevelt's Court Packing Plan was first proposed but later practically abandoned.[52] Chief Justice Hughes speaking to the American Law Institute in May, 1934, said that "all the Justices pass upon the applications for certiorari". And Frankfurter's article in 14 *Encyclopedia of the Social Sciences* 438 was quoted as saying, "Experience is conclusive that to enlarge the size of the Supreme Court would be self-defeating."[53] This was with respect to the President's proposal to increase the membership of the Supreme Court to fifteen.

Professor Hart says that one reason the Court is overworked is that "For years now a divided Court has persisted in granting certiorari at the behest of unsuccessful plaintiffs in Federal Employers' Liability Act cases involving nothing of importance except an appraisal of the evidence in the particular litigation. The practice has been extended to other personal-injury cases.[54]

And this brings us to the heart of the matter. It is not enough for the Court to possess the power of judicial review. Review is the basis of all our liberties and constitutional rights and the question from year to year—indeed from day to day—is whether the Court is using that power when it should be used. We are deceiving ourselves if we are relying on an unused power. We must be on the alert to see (to use the phrase again) that beauty like a dial hand does not steal from the figure and no pace perceived.

We should know as well as Condorcet writing during the French Revolution that "there can be a vast discrepancy between the law in writing and the law applied".[55]

It is not enough for us to take the unintelligent and lazy way of saying that "the truth lies in between" the assertions of those who say that the Court usurps power and the claims of many that the Court has now abdicated its power and abandoned its trust, failed in its duty. Certainly it must be said that for many years it has been apparent that the Court has abandoned all pretense of declaring unconstitu-

46. *Youngstown Sheet and Tube Co.* v. *Sawyer*, 343 U. S. 579 (1952).

47. See for example the disagreement between Professor Henry M. Hart, Jr., who says, "The American people are entitled to better judging" than they are getting in 73 HARV. L. REV. 122 (November, 1959) and Thurman Arnold, who characterized Hart's criticisms as "pompous generalizations dropped on the Court from the heights of Olympus" in 73 HARV. L. REV. 1299 (May, 1960).

48. *Cf.* Magna Charta, C.A. 29.

49. 73 HARV. L. REV. 84.

50. 73 HARV. L. REV. 1314.

51. Chief Justice Taft was largely responsible for the 1925 legislation. Fowler V. Harper and Alan S. Rosenthal, 99 U. OF PA. L. REV. 295 (December, 1950). For its legislative history see Frankfurter and Landis, THE BUSINESS OF THE SUPREME COURT 255-298 (1927).

52. *Reorganization of the Federal Judiciary*, statement by Edward R. Burke, of Nebraska, Special Committee of American Bar Association, May, 1937, page 9.

53. *Id.* 58, 59.

54. 73 HARV. L. REV. 96. Arnold says there were only two such cases out of 127 opinions in the last term and cites Mr. Justice Douglas as saying that in the ten years preceding 1959 certiorari was granted in only thirty-two F.E.L.A. cases with only twelve of these argued, briefed and disposed of with full opinions, an average of slightly over one a year and saying "wastage of our time is therefore a false issue". Justice Frankfurter has severely criticized this practice saying: "If the Court does not abide by its Rules, how can it expect the bar to do so?"

Evidence was reviewed as to a worker who had been injured when he tried to avoid the flames from burning weeds along the track (*Rogers* v. *Missouri Pacific R. Co.*, 352 U. S. 500 (1957)); a conductor who fell from a train (*Herdman* v. *Penn. Ry. Co.*, 352 U. S. 518); a baker who cut his hand (*Ferguson* v. *Moore-McCormack Lines, Inc.*, 352 U. S. 521); a railroad employee injured while answering a call of nature (*Ringheiser* v. *Chesapeake & O. R. Co.*, 354 U. S. 901). For other cases see 53 AM. POL. SCI. REV. 156 (March, 1959), *Keenan* v. *American Dredging Co.*, 355 U. S. 426 (1958), and see Frankfurter's dissenting opinion in *Dick* v. *New York Life Insurance Co.*, 359 U. S. 437 (1959) a double indemnity case involving the question whether death by gunshot wounds was accidental or suicidal. In *Faulkner* v. *Gibbs*, 338 U. S. 267 (1949), passed on findings as to pinball machine without stating law.

55. In THEORIES OF HISTORY, edited by Patrick Gardiner, Glencoe, Illinois (1959), page 56.

tional acts of Congress which affect economic as distinguished from personal or civil rights.[56]

We hear much of smoke-filled rooms but it must be said that compared to the judiciary, members of the legislative and executive departments lead fish-bowl lives. Their activities generally are carried on in the light of pitiless publicity. While they have their private conferences and occasional executive sessions, as a rule they not only act in public but they debate and confer in public. And generally they accompany what they do with widely publicized announcements as to why they are doing it. The legislative act may be preceded by a preamble of whereases, some if not all propaganda,[57] some perhaps false. Not so the judiciary.

Connotations of plotting conspiracy are found in Jefferson's reference to Marshall's Court: "An opinion is huddled up in conclave, perhaps by a majority of one, delivered as if unanimous, and with the silent acquiescence of lazy and timid associates, by a crafty chief judge, who sophisticates the law to his mind, by the turn of his own reasoning."[58] There are no conspiratorial overtones to the statement that certiorari is mysterious, if not secret.[59]

Justice Jackson said, "A suspicion has grown at the bar that the law clerks (of which each of us has two save the chief, who has three) constitute a kind of junior court which decides the fate of certiorari petitions. This idea of the law clerks' influence gave rise to a lawyer's waggish statement that the Senate no longer need bother about confirmation of justices, but ought to confirm the appointment of law clerks." Mr. Justice Clark said he had been "asked by prominent lawyers to speak to his law clerks about their petitions".[60]

Certainly with one thousand to thirteen hundred petitions for certiorari each year with their briefs and records the Court is confronted with an enormous amount of reading material. It may be granted that an experienced judge,[61] and for that matter an experienced law clerk, may acquire a facility in getting at the root of the problem without reading every paper in the case, but the fact remains that, objections to the anonymity of the clerk and ignorance of the degree of his influence or action aside, the justices must spend a great deal of time on certiorari which might better be spent in study of submitted cases and of the economic and sociological facts now regarded so important to the judicial background for decision.

One Solution for the Certiorari Problem

It is suggested that Congress authorize each justice of the Supreme Court to appoint one, or the full Court to appoint nine commissioners of that Court to be confirmed in appointment by the United States Senate. The commissioners would assist the Court pursuant to rules laid down by the Court. These rules could authorize and require the commissioners to study all petitions in certiorari and make written recommendations to the Court setting forth the reasons for recommended denial or granting of the petitions.[62] In this way the present complete lack of knowledge of reasons for denial could be replaced by records enlightening to the Bar, but not necessarily creating precedents binding on the Court. This would help meet "one of the demands of a democratic society—that the public should know what goes on in court".[63]

And finally, what about the efficiency of the Court in performing its task, particularly in granting certiorari in cases where the public interests demand determination of great constitutional questions without further delay?

It is remarkable that in a land properly known as the home of scientific management,[64] of the Taylor time studies,[65] where studies of the efficiency and economy of the national government's executive departments began half a century ago[66] and the federal courts below the Supreme Court "have in a quiet but effective way accomplished for themselves a very thorough overhauling, and integration"[67] there have been no great and effective studies of the Supreme Court.

Professors Frankfurter, Landis and Hart have done yeomen service. But the task of certiorari appraisal is too vast for one man. A national foundation should engage a competently directed staff of disinterested experts to study all the certiorari records for the last ten years at least. The petition, record, briefs and the Court's action

56. See for example 42 AM. POL. SCI. REV. 32 (February, 1948); 6 JOURNAL OF PUBLIC LAW 298, 312 (Fall, 1957); C. Herman Pritchett, THE AMERICAN CONSTITUTION 589 (New York, 1959).

57. The preamble to the Minnesota Moratorium Statute sustained in *Home Building & Loan Assn.* v. *Blaisdell*, 290 U. S. 398 (1934), was important.

Plato suggested persuasive or educative preambles. Ernest Barker, GREEK POLITICAL THOUGHT 116 (3d ed., London, 1947). The statute of uses was fortified with "a wealth of hypocritical justification". Edward Jenks, A SHORT HISTORY OF ENGLISH LAW 100 (London, 6th. ed. 1949). It was "the sixteenth century equivalent of a leading article in a government newspaper upon a government measure". 4 Holdsworth, A HISTORY OF ENGLISH LAW 460 (Boston, 1924). "Apropos of the statute of 1536 abolishing monasteries—no historian of the present generation would, like Mr. Froude, believe the allegations in the preamble simply because they were there stated." Allen Johnson, THE HISTORIAN AND HISTORICAL EVIDENCE 92 (New York, 1926). Of the "good propaganda style" of Henry VIII's preambles see 2 Philip Hughes, THE REFORMATION IN ENGLAND 367 (New York, 1954), of Henry VIII's Statute of Appeals, Holdsworth, 591, says "The preamble ... is remarkable, partly because it manufactures history upon an unprecedented scale ... It was not until an historian arose (Maitland) ... the greatest historian of this century, that the historical worthlessness of Henry's theory was finally demonstrated."

Provisors and Praemunire had propaganda preambles—Faith Thompson, A SHORT HISTORY OF PARLIAMENT 78 (Minneapolis, 1953).

58. To Richie, December 25, 1820, 12 WORKS 176 (Ford ed.) Jefferson argued for "every one's giving his opinion seriatim and publicly on the cases he decides. Let him prove by his reasoning that he has read the papers, that he has considered the case, that in the application of the law to it, he uses his own judgment; independently ... The very idea of cooking up opinions in conclave begets suspicions that something passes which fears the public ear." To William Johnson, 10 WORKS 248, see also 199, 223.

59. "In what cases involving a denial of certiorari it is difficult to know what goes on behind the curtain." Harper and Rosenthal, 99 U. PA. L. REV. 297 (December, 1950), "Certiorari practice is also the least known and the least knowable." Dungan in 6 JOURNAL OF PUBLIC LAW 380 (Fall, 1952).

60. 43 JOURNAL OF THE AMERICAN JUDICATURE SOCIETY 49 (August, 1959) where he quoted Jackson, Hart in 73 HARV. L. REV 87 (November, 1959) says: "A justice can make use of the assistance of one or both of his two law clerks in studying and abstracting this material for him, although not every justice does so." To the same effect John P. Frank, MARBLE PALACE 14 (New York, 1958).

61. Stone spoke of this skill—Alpheus T. Mason, HARLAN FISKE STONE 448, (New York, 1956).

62. Until the Minnesota Constitution was amended to provide for seven supreme court justices there were only five. These could not keep abreast of the work of the court so commissioners to assist the court were appointed pursuant to Laws 1913 C. 62.

63. Frankfurter in *Baltimore Radio Show* v. *Maryland*, 67 A. 2d 497 (1949). *Cert. denied*, 338 U. S. 912 (1950).

64. 3 ENCY. SOCIAL SCIENCES 89 (New York, 1930).

65. 13 ENCY. SOCIAL SCIENCES 603 (New York, 1934).

66. 11 ENCY. SOCIAL SCIENCES 483 (New York, 1933).

67. William Anderson, GOVERNMENT OF THE UNITED STATES 292 (New York, 1946).

or comments on each case should be carefully analyzed to determine to the extent possible grounds for action, particularly denials. In what cases were there divisions among the courts of appeals or other courts? How long had these existed? What previous efforts if any had been made to get certiorari? How important and what was the nature of the public interest? Was the question primarily one of alleged violation of economic rights or of personal or civil rights? What was the circumambient political, social, moral, international or other atmosphere that might affect the court's decision as to timing? Was the petition for certiorari invited by any member or members of the Court and if so in what manner and for what apparent reasons? What effect, if any, did dissension in the Court, if any, have upon the decision to grant or deny the petition?

No one wants to hold a stop watch on Justices of the Supreme Court. Criticism and approval of the Court's work as revealed in its reported decisions and opinions should be left to the unorganized public and to a sympathetic and appreciative but constructively critical Bench and Bar.

But questions on certiorari, answered as fully and specifically and objectively as the nature of the materials permits, would enable the public, Bench and Bar, intelligently and effectively to assist the Court in fulfilling its great responsibility to hold the constitutional balance even between the exercise of governmental power on the one hand and the preservation of individual liberties, both as individual persons and as owners of property, on the other.

American Bar Association Endowment Increases Benefits for Members of Senior Insurance Plan

For the third time in three successive years the Endowment has increased insurance benefits to participants without any additional assessment to them. Also, in order to strengthen and broaden the insurance plans the Endowment is lowering the entrance age from 35 years in the Senior Plan so that all members under 70 years of age may participate. Previously, only those members who had attained their 35th birthday were eligible to enroll.

Jacob M. Lashly, President of the American Bar Association Endowment, has announced that with the adoption of this new program member lawyers will have the opportunity to increase substantially their estate with inexpensive group term insurance.

President Lashly explained that all eligible lawyers under 56 years of age may participate in both plans which together offer $20,000 of life insurance protection to age 38. The benefits payable upon death from any cause decline on a graduated scale to $5,000 at age 56. The Senior Plan continues through age 72, with $5,000 of coverage through age 69 and $3,000 thereafter.

The benefits now being offered in the Senior Plan are being increased in varying amounts from $300 to $2,900 depending upon age, and will go into effect on September 1, 1960, for all current participants and for all new enrollees without any increase in the current contribution.

The premium contribution for participants in the Senior Plan under 30 years of age is only $25; for those 30 to 34 years of age, $45; and for participants 35 to 49 years of age, $70. The coverage available under this plan combined with the coverage available under the popular Junior Plan for only $20 per year makes this program one of the finest available to the legal profession. The plans also provide conversion privileges and provide waiver of premium while totally disabled.

The Endowment's insurance program, now in its sixth year, currently insures more than 33,000 lawyers from coast to coast and in twenty-three foreign countries with nearly $200,000,000 of group life insurance. This large participation over a wide area spreads the risk and enables the underwriter to offer more attractive coverage. (The state law of Texas makes participation unavailable to members in that state.)

The Endowment's insurance program permits participants to be insured on attractive terms and, at the same time, makes the dividends under the two plans available to the Endowment for its tax-exempt purposes. Such dividends are paid by the underwriter to the Endowment with the consent of the participants. Members who desire to do so may designate the American Bar Foundation as a beneficiary. The dividends which have been contributed by the participants in these plans and bequests received from other sources have enabled the Endowment to donate, or commit itself to donate, more than $1,000,000 in support of the American Bar Foundation and projects in the field of legal research and education.

Correspondence concerning the program may be addressed to the American Bar Association Endowment, 1155 East Sixtieth Street, Chicago 37, Illinois.

Books for Lawyers

POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE. *By Alexander Meiklejohn. New York: Harper and Brothers. 1960. $3.50. Pages 166.*

Political Freedom consists of a series of essays on the constitutional guarantees of freedom of communication. Professor Malcolm P. Sharp of the Law School of the University of Chicago provided a gracious and thoughtful foreword. The major portion of Professor Meiklejohn's contribution consists of three essays on free speech and its relation to self-government. This portion of the book is supplemented by essays on a number of related public policy stands taken by the author. The materials on free speech were originally developed in 1948 when Alexander Meiklejohn presented a major argument in the mid-twentieth century debate over the meaning of the Bill of Rights. The setting was in three of the University of Chicago's Walgreen Lectures.

Ironically, a surprisingly large number of legal commentators have, on the basis of these lectures, categorized Professor Meiklejohn as an advocate of an "absolutist" interpretation. However, his basic argument was far more complex. As Meiklejohn put it, "free citizens have two distinct sets of civil liberties". In exercising their public responsibility and power as active participants in civic affairs, citizens "require an absolute freedom". This requirement was, in his argument, imperatively commanded by the unequivocal language of the First Amendment. Conversely, this requirement does not extend to communication involving private rather than public purposes. The private concerns of citizens, according to Meiklejohn, are, to be sure, constitutionally protected. But it is a lower order of protection, under the Fifth rather than the First Amendment. Under the former, persons may be "deprived of life, liberty or property" if they are provided the traditional elements of due process of law. Under the First Amendment, any abridgment of freedom is absolutely forbidden.

It is quite clear that this distinction raises a number of serious questions. Under what circumstances may the utterances of citizens be categorized as involving a public or a private purpose? Who may properly make such a categorization? Professor Meiklejohn provided one answer to the first question in his discussion of commercial radio. He argued that:

> . . . The radio as it now operates among us is not free. Nor is it entitled to the protection of the First Amendment. It is not engaged in the task of enlarging and enriching human communication. It is engaged in making money. And the First Amendment does not intend to guarantee men freedom to say what some private interest pays them to say for its own advantage. It intends only to make men free to say what, as citizens, they think, what they believe, about the general welfare.

For those who relish every opportunity to castigate modern liberalism, the temptation will be irresistible to derisively point out the difficulties inherent in this argument. To be sure difficulties do present themselves. Unfortunately, some of Professor Meiklejohn's provocative suggestions, if pressed to logical extreme, could prove destructive of political freedom. This is not to suggest that so staunch an intellectual critic of domestic paternalism (both private and public) and the fearful tyranny of Communist and Fascist regimes abroad has embraced a subtle totalitarianism. Rather it is to emphasize that a well-intentioned solution could, if applied with evil or careless intent, prove destructive of the very democratic values Professor Meiklejohn seeks to preserve. At times the ghost of Rousseau's "General Will", hovers in Meiklejohn's appraisal.

All this strongly suggests that Professor Meiklejohn's solution to the dilemma posed by private abuse of the fundamental freedoms is fraught with difficulties. But if his conclusions are subject to serious qualification, his definition of the problem is essentially sound. Manipulation of public attitudes for private gain *is* a serious problem. The mass media *do* often contribute little to the kind of continuing public debate so vital to the existence of democracy and much that distorts public perspective and debases or belittles civic virtue. British usage provides an apt term to describe the institutionalization of private manipulation of public attitudes—"the Establishment". In America, the Establishment shares a major responsibility for the complacency, the eschewing of personal involvement in public purposes so prevalent in recent years.

How, then, may a democratic society come to grips with flagrant private abuse of the fundamental freedoms? Can a solution consistant with democratic values be found?

Professor Meiklejohn's enduring contribution lay in stating and clarifying these issues. In so doing he has fulfilled the highest function of the teacher—the stimulation of independent thought.

JOHN R. SCHMIDHAUSER
State University of Iowa
Iowa City, Iowa

LAWYER, HEAL THYSELF! *By Bill Mortlock. New York: The Macmillan Company. 1960. $3.95. Pages 211.*

Here, skillfully interwoven, are two stories in one. There is the day-by-day account of the infinitely varied stream of human problems which pours through the office of a London solicitor who specializes in domestic difficulties. There is also the highly personal blow-by-blow record of the steps by which the author's own marriage disintegrates. The book is in autobiographical form. Its jacket informs the reader that "Bill Mortlock is the pseudonym of a rising young London solicitor." Even without this label the reader

would probably reach the same conclusion. It would be difficult if not impossible for an outsider to become familiar with these "case histories". The style is interesting, forceful, clever, fast moving. The language is always outspoken, crisp, often bitter, sometimes even brutal.

Who should read the book? The answer includes both lawyers and laymen. The curious layman will find a practically first-hand description of how certain English solicitors spend their professional day. Members of other professions also interested in the problems of the modern "civilized" family (such as psychiatrists, physicians, marriage counsellors, social workers and others) will find some interesting material on which to base a comparison of professional competence. Such readers may wonder why the profession of the law which sets so much store by the concept of "reasonableness" should permit its members who engage in the practice of family law to go out on so many non-legal limbs. The American lawyer will be rewarded on examining these pages by a compassionate picture of his opposite number in another country. The author has prepared a feast which should have nutriment for many different groups of people.

My interest extends to the whole book but as space is limited I shall emphasize only a single point. The personal story is interesting not so much because of the details in the process of demoralization of a single marriage of a professional man. The superficial reader will be interested in *what* happened. A more thoughtful consideration should evoke the further question —*why*? To be sure, anyone living in an emotional, lurid, noxious atmosphere is likely to have some of it rub off on himself; but *why* do we permit our professional colleagues to live in an atmosphere which makes unnecessarily heavy demands upon them. From this it is but a step to the further question—whose responsibility is it to do something about the situation?

It can hardly be maintained that the field of family law is the most popular area for law practice. There are, we all know, law firms which decline this type of employment. Others accept it with regret and get rid of it as soon as they properly can do so. To suggest that this trend towards avoidance is motivated by the fear that the financial rewards will be small is a discourtesy to many lawyers who in accepting these cases give unstintingly of themselves. To explain the desire to reject on some such basis as that the field is not "important" is quite unrealistic. Importance in the law is quite as often determined by the client as it is by the lawyer, or the law professor, and from the client's viewpoint family law is very important. It seems that there is something innately displeasing in this sort of work. One suspects particularly after reading this book that the difficulty is in trying to draw a line between what is professional service and what becomes personal involvement in the client and his affairs.

While the individual lawyer may feel free to refuse to accept this sort of employment or may satisfy his conscience by referring it to someone possibly less particular, the profession as a whole is not in so independent a position. Along with its exclusive right to practice law there goes the obligation to see that all clients with legal problems have what we call "the equal protection of the law". That equality is not alone a problem of economics. It embraces the task of seeing that all legal problems of whatever sort, agreeable or disagreeable, shall receive the best possible service.

A persuasive argument can be made to the effect that sex is here to stay. From this premise it is but a step to the assumption that as long as there are two sexes, representatives of both will be seeking marriage. The cynic suggests that as long as there is marriage, there will be a certain number of matrimonial problems, and one division of those problems seems to lie naturally and logically at the door of the legal profession—and nowhere else.

It is not facing up realistically to over-all obligations to allow groups of lawyers to decline to accept such legal employment unless, at the same time, we are readying another equally competent group to respond to public demands for help in domestic crises. Bill Mortlock seems to have drifted into this type of practice with not much more preparation than an interest in human problems and a facility in lending a shoulder on which the client might comfortably weep. The decline in his domestic morals is, therefore, not surprising.

What is surprising is the lack of an aggressive movement at the Bar among bar examiners and even further back in curriculum committees of law schools to find what is wrong with family law practice and set it right. If the person who reads this book will give it a second thought, he may be able to come up with an answer. One Bill Mortlock is interesting as a horrible example. A succession of them would be (should we go so far as to say *is?*) a reflection on all three branches of the profession.

JOHN S. BRADWAY

Hastings College of Law
San Francisco, California

THE FEDERAL ESTATE AND GIFT TAXES. *By Richard B. Stephens and Thomas L. Marr. Tucson, Arizona: The Tax Club Press. 1959. $9.00. Pages xviii, 426.*

This does not purport to be a research tool, but it serves its limited purpose well—that of giving a bird's-eye view of the intricate estate and gift tax provisions. It will be useful in refreshing the practitioner's recollection of the typical problems involved, and in stimulating his imagination while dealing with actual situations. A lawyer having specific responsibility in this field will still have to make a serious study of the regulations and of all the authorities, and could also profitably compare the views he then develops with the recently published six-volume treatise by other authors covering these subjects.

The authors have condensed in an easy-to-read style an examination of the statutory language of each provision, a short explanation of reasons for the various intricate statutory rules, and a good capsule review of the legislative history and judicial background of many of the important provisions. No attempt is made to compile relevant decisions to any important extent, but the authors have shown skill in select-

ing illustrative cases to support the discussion.

The book is perhaps to be criticized in that it gives too little regard to the Treasury Regulations. Although it often cites them and sometimes discusses them, the authors seem to assume that in the main the regulations parrot the statute, except on certain precise problems. Experience in private practice indicates the contrary; the regulations in this field furnish important and very helpful elaboration. They have been developed over a long period of years to incorporate many of the judicial interpretations, and they strongly influence administrative handling of cases. That the authors may not be treating seriously enough Treasury Regulations is illustrated by this statement: "It is sometimes argued that the market prices do not reflect value." This is followed by a statement that the idea "has gained limited judicial recognition". A practitioner relying only on these statements would be in more serious doubt than the practical situation justifies. His most immediate concern is not with the courts but as to what the administrative authorities will do; they give heavy weight to regulations. Section 20.2031 (e) of the regulations goes far beyond treating this idea as an "argument":

> ...If the executor can show that the block of stock to be valued is so large in relation to the actual sales on the existing market that it could not be liquidated in a reasonable time without depressing the market, the price at which the block could be sold as such outside the usual market, as through an underwriter, may be a more accurate indication of value than market quotations.

The fact is, also, that this provision of the regulations is being given effect in the administrative disposition of many cases.

In dealing with complicated subjects like these, as to which there are considerable areas of doubt, it would be hard for any author to decide what points to mention in such an outline as this and what points to leave to full-scale treatises. But this is a worthwhile effort by serious students of the subject.

ROBERT N. MILLER
Washington, D. C.

THE NATURAL LAW READER. *Edited by Brendan F. Brown. Docket Series, Vol. 13. New York: Oceana Publications. 1960. $3.50. Pages 230.*

Someone has remarked that the natural law always buries its undertakers. Within recent years the American Bench and Bar have taken a hard second look at natural law, producing what some have called—perhaps too enthusiastically—a "revival" of natural law thinking.

One of the basic difficulties for all but the truly academic lawyer has been the paucity and unavailability of literature on the natural law. This problem has been solved to some extent by this excellent (though too brief) collection of materials on the natural law by Dr. Brown, former Dean of the Catholic University School of Law and now Professor of Law at Loyola University in New Orleans.

One of the most intriguing questions surrounding the "revival" of natural law involves the reasons why lawyers and judges "convert" to natural law. There is no doubt that the Hitler regime with its failure of the rule of law, the empty positivism of John Austin and his American disciples and the whole restless state of American jurisprudence have recalled the legal mind of modern America back to an idea which was venerable when Cicero transmitted it to posterity. Today in fact a large and perhaps an increasing number of American jurists will concede the existence of some type of relative absolutes or permanent principles or something stable which will shield us from the naked nominalism of Hans Kelsen or the philosophical bankruptcy of the legal realism of the thirties.

Very few American jurists accept the theistic natural law enunciated by Thomas Aquinas and now elaborated by the Catholic Church. Dr. Brown has devoted the first part of his volume to a collection of documents with appropriate comments on this God-centered traditional type of natural law. This section—roughly one half of the book—is a careful selection of texts from Plato up to the present along with very persuasive material indicating how natural law has played an enormously important role in shaping American legal institutions.

Dr. Brown's second section—entitled "non-scholastic natural law" takes up modern schools of jurisprudence which approach natural law thinking. Although the terrain here is vast—from Kant to Jerome Frank—one is pleased to see well chosen selections from Jerome Hall, Lon L. Fuller and Joseph P. Witherspoon. The absence of a selection from Professor D'Entreves' magnificent little work *"The Natural Law"* (Hutchinson's University Library, 1951) is regrettable. In this work—probably the most lucid explanation of natural law in English—D'Entreves makes a splendid appeal for all natural law jurists to join in a non-theistic affirmation of basic moral values predicated on human dignity.

Frederick Pollock has written that the "law of nature ... is a living embodiment of the collective reason of civilized mankind, and as such is adopted by the common law in substance though not always in name." After citing this sentence Jerome Hall expresses the opinion that "most legal scholars and lawyers ... are ... practising natural law philosophers". Why then is there such a massive reluctance to concede that natural law has been and is a source of our judicial decisions? That is the question which Dr. Brown's book was not to answer. But this volume of basic documents will long be an indispensable tool to those who must agonize over this, the most central legal problem of our day.

ROBERT F. DRINAN, S.J.
Boston College Law School

UNDERSTANDING JUVENILE DELINQUENCY. *By Lee R. Steiner. Philadelphia: Chilton Company, Book Division. 1960. $3.95. Pages vi, 194.*

This volume is described by its publishers as "a brutally frank, hard-hitting book ... one that cannot fail to enlighten educators, social workers, law-enforcement officers and—above all—parents". Informed readers cannot turn to this volume for enlightenment and uninformed readers will gain little but confusion.

There is a great need for a popular and accurate account of the complex

social phenomenon called juvenile delinquency. Many gifted workers in the field are inadequate when it comes to explaining in simple terms what they are discovering about the child offender. The author's qualifications would lead us to expect that she could perform this task. Described as a certified psychologist, psychoanalyst, consultant in personal problems, lecturer and broadcaster, she has been for the past thirteen years producer and moderator of a program called "Psychologically Speaking". Thus she is accustomed to presenting her material in a lively fashion to keep her listeners from being lured to other stations. Indeed her opening chapter, "Can We Prevent Delinquency?" is a reproduction of an unrehearsed roundtable presented in New York City over WEVD University of the Air on May 4, 1959. But the liveliness of her style cannot make up for the helter-skelter presentation, distortions and omissions of her material.

The chapter headings themselves are the clichés with which a troubled and at times angry community gropes for understanding of the child offender. "Is Youth Going to the Dogs?", "Why Some Kids Go Wrong", "Do Slums Create Delinquents?" are the titles of a few. But within each chapter, in a manner which offers no clear exposition of the aspect of delinquency under discussion, the author draws upon personal reminiscence, occasional cases from her professional practice, newspaper stories, and such research findings as for the moment support her thesis.

For example, in a chapter titled "Are Parents To Blame?" the author makes the point that a home which "seems good and healthy and normal" may produce a delinquent child. On page 44 she offers to describe such a home. Eighteen pages later the reader learns that the mother deserted when the child was five. But this is only after much extraneous information including what the author had for breakfast on her way to test the fourteen-year-old girl who is before the juvenile court for persistent truancy. The lawyer, who has known the family, regards "Franny" as just like her mother and adds, "What kind of woman ups and leaves two kids and never inquires whether they are alive or dead? Franny even looks like her mother." The account of Franny's history contains much that to a trained person would explain her truancy, but nothing that would support the author's promise to describe delinquency in a good, healthy normal home.

Similar inconsistencies within other chapters occur throughout the book, but the greatest difficulty is that these negate the useful and valid information which she also presents. The author performs a service in describing several typical children's courts. The reader is confronted by many difficult cases. These range from offenses against children, in which the child is not the offender, to the child whose impulses are so poorly controlled that he becomes a murderer. For each of the problems which come before him, the judge must reach a wise decision. The basic assumption of the juvenile court procedure is that the needs of children and of the community can be met by a combination of law and social services. Today students of the court are concerned that there is a serious abridgment of the rights of children in the very courts which are set up to protect these rights. The author makes the point that adolescents whose offenses take them out of juvenile court jurisdiction have greater protection since they are entitled to legal representation and a jury trial. That some judges who sit in children's courts are unwilling captives, indifferent, uninformed and harsh cannot be questioned. That social services are meager and poorly staffed in relation to the tremendous demands upon them is also well known. But the author subjects all professional groups engaged in work with the child offender to ridicule and distorts their work in order to make her point.

The fact is that at the present state of our knowledge about and services to the child offender, some can be cured, some can be protected from further harm to the community and to themselves; but for others, the juvenile court experience and related correctional services seem to be the initiation rite in a steady progression to adult delinquency. An increasing number of juvenile court judges have written thoughtful and scholarly articles about the discrepancy between concept and practice in the juvenile court, but the author makes no mention of these.

The author is sharply critical of a society which seems to be apathetic, if not harshly punitive, toward the delinquent. The inadequacies of our educational system, our recreational facilities, our treatment and correctional institutions are reviewed. Some of the limitations in our knowledge of causation, treatment and cure are exposed, though in haphazard fashion. Throughout the book the author emphasizes the need for basic research, yet there is no methodical indication of what research has already established.

This reviewer is a social worker and may not take the space to point out the misrepresentations which occur about social work or therapy. However, the readers of this journal will be interested in her presentation of lawyers.

On page 85 a lawyer called in to defend a bookie has won a not guilty verdict from the jury. In response to the author's question as to how he achieved this, he replies,

> "Someone played ball. I was allowed to select the jury and the only issue was to be, to whom did the slips belong."
> "But why the aging females for the jury?"
> "Well, women don't have to serve. So, if they do, they have time on their hands, especially the older ones. And if an older woman has time on her hands, ten to one she's gambling."

Again on pages 102-103, the author has been called in to test an unmarried mother whose yet unborn baby is to be placed with a couple who stand to inherit three million dollars if they can produce a child. The author was interested in learning from the family's attorney how this could be handled.

> The attorney told me it was simple enough. The baby had been registered at the hospital as Terry with Becky's last name. That was one birth certificate. But when little Terry arrived . . .

a new birth awaited him. The new mother-to-be, who had been wearing padding of increasing proportions over the past four months, was rushed to the hospital with "her child", an alleged spontaneous birth. There the two were placed in a private room with a private nurse. No visitors were allowed. Little Terry was registered by the hospital under a new name and the new mother went home with her "natural" child.

No one questions that this kind of practice occurs, but the author does not point out that this is exceptional conduct. Nowhere is there mention of the large group of lawyers who serve on the boards of children's agencies and institutions and on committees of local bar associations seeking to improve the institutions and laws relating to children.

It is regrettable that with the great need for a book which will bring understanding and arouse the interested participation of the community in the problems of juvenile delinquency, this volume does not perform this task.

MIRIAM ELSON

Chicago, Illinois

THE LAW OF COMMERCIAL PRACTICES. *By Frederick A. Whitney. Mount Kisco, New York: Baker Voorhis & Co., Inc. 1958. $25. Pages 1174.*

The author, Vice Dean and Professor Emeritus of St. John's University School of Law, has done a tremendous job in bringing within the covers of a single volume an exposition of many subjects not readily found in texts. Based upon the theory of the Uniform Commercial Code, in his endeavor to bring within a single body of the law all possible steps in a commercial transaction, the author has followed a similar pattern in presenting a discussion of the subject of money, banking and credit instruments, bailments, warehouse receipts, the various uniform laws, the law of sales, the legal problems surrounding the issuance of a check, negotiable instruments, creditors' rights and the various proceedings under the Bankruptcy Act, suretyship and insurance.

The discussion of these subjects can readily be found in other comparable volumes, but when we get into the field of secured transactions in the last third of the volume we have a comprehensive review of the theory of security devices in all their complexities.

Financing for either vendor or vendee in a sale transaction is discussed with respect to the use of the conditional sale contract or the purchase money chattel mortgage. Reference is made to the subject of usury, remedies in the event of default, prohibitions against waiving statutory protection, "add-ons", the new Retail Instalment Sales Acts, the problem of fixtures and the legal problems arising out of a conditional sale of goods for resale. Under third party financing in dealer-consumer sales, the author also considers the complexities of filing and re-filing provisions, the question of after-acquired property, Motor Vehicle Retail Instalment Sales Acts, penal provisions with respect to chattel mortgages and he adds frequent reference to the applicable provisions of the Uniform Commercial Code.

There is an interesting discussion of the financing possibilities afforded by field warehousing and a review of the case law applicable thereto. The question of inventory financing with its problem of the "shifting lien" and the subject of accounts receivable in and out of factoring transactions is also discussed at length. The problem of *Benedict* v. *Ratner* is discussed. The nature and purpose of trust receipt transactions are considered with a discussion of the use of the trust receipt at common law and under the uniform act. Reference is also made to the possible use of the chattel mortgage in lieu of the trust receipt to cover motor vehicles under special statutes in some states. There is a chapter devoted to the subject of letters of credit and a concluding discussion of financing the growth, distribution and marketing of agricultural products.

It is apparent that the author did not see fit to include in his discussion the increasingly important subject of the financing of chattel leases and the tax ramifications that are involved therein. In fact little attention is paid to the subject of the tax aspects of secured transactions. The author adds in an appendix, thirty-eight forms commonly used in the commercial transaction, most of which were supplied to him through the courtesy of Manufacturers Trust Company of New York City.

LESTER E. DENONN

New York, New York

Review of Recent Supreme Court Decisions

George Rossman

EDITOR-in-CHARGE

Admiralty . . .
unseaworthiness

Mitchell v. *Trawler Racer, Inc.*, 362 U. S. 539, 4 L. ed. 2d 941, 80 S. Ct. 926, 28 Law Week 4293. (No. 176, decided May 16, 1960.) *On writ of certiorari to the United States Court of Appeals for the First Circuit. Reversed and remanded.*

The issue here was whether it was necessary, in order to recover for the unseaworthiness of a vessel, to prove that the owner had notice of the defect. The Court held that the owner's duty to furnish a seaworthy ship was absolute and completely independent of any duty to exercise reasonable care.

The petitioner was a member of the crew of a fishing trawler who was injured when he lost his footing on an accumulation of slime and fish gurry remaining on the ship's rail after the catch was unloaded. He filed this action containing three counts: one for negligence under the Jones Act, another for unseaworthiness and the third for maintenance and cure. The District Judge instructed the jury that in order to allow recovery for either negligence or unseaworthiness they must find that the slime and gurry had been on the rail long enough for the owner to have learned about it and removed it. The jury awarded maintenance and cure, but found for the ship's owner on both the negligence and unseaworthiness counts. The appeal was taken on the sole ground that the judge erred in instructing the jury that constructive notice was necessary to support liability for unseaworthiness, but the Court of Appeals affirmed.

Mr. Justice STEWART reversed and remanded for the Supreme Court. The Court traced the concept of absolute liability for unseaworthiness to *The Osceola*, 189 U. S. 158 (1903), although it admitted that that case itself may not have imposed so rigorous a standard. "There is ample room for argument, in the light of history, as to how the law of unseaworthiness should have or could have developed", the Court said. "But, in view of the decisions in this Court over the last 15 years, we can find no room for argument as to what the law is. What has evolved is a complete divorcement of unseaworthiness liability from concepts of negligence. To hold otherwise now would be to erase more than just a page of history." The Court said that the owner was not obliged to furnish an accident-free ship. "The duty is absolute, but it is a duty only to furnish a vessel and appurtenances reasonably fit for their intended use."

Mr. Justice FRANKFURTER wrote a dissent in which Mr. Justice HARLAN and Mr. Justice WHITTAKER joined. The dissent argued that the absolute liability doctrine enunciated by the Court rested on an erroneous reading of the early cases and accomplished nothing since imposing absolute liability could not exact any additional care on the part of the owner.

Mr. Justice HARLAN wrote a dissenting opinion in which Mr. Justice FRANKFURTER and Mr. Justice WHITTAKER joined. This opinion pointed out that there was no claim that the vessel should have made different provisions for unloading the catch or for the debarking of the crew. The owner was being held liable for an injury caused by the temporary unsafe condition arising from normal operation of the vessel, the dissent argued, and no purpose was served by imposing absolute liability.

The case was argued by Morris D. Katz for petitioner and by James A. Whipple for respondent.

Antitrust law . . .
agricultural co-operatives

Maryland and Virginia Milk Producers Association, Inc. v. *United States, United States* v. *Maryland and Virginia Milk Producers Association, Inc.*, 362 U. S. 458, 4 L. ed. 2d 880, 80 S. Ct. 847, 28 Law Week 4285. (Nos. 62 and 73, decided May 2, 1960.) *On appeals from the United States District Court for the District of Columbia. Affirmed in part and reversed and remanded in part.*

Section 6 of the Clayton Act, exempting agricultural organizations from antitrust laws along with labor unions when they are "lawfully carrying out their legitimate object", does not completely remove such organizations from the reach of the Sherman Act, this decision held.

This was a civil action brought against the Maryland and Virginia Milk Producers Association, Inc., an agricultural co-operative that supplies about 86 per cent of the milk purchased by milk dealers in the Washington, D. C., area. Its membership is composed of about 2,000 Maryland and Virginia dairy farmers. The complaint alleged (1) an attempt to monopolize interstate trade in fluid milk in violation of Section 2 of the Sherman Act, (2) a conspiracy with Embassy Dairy and others to eliminate competition in

Reviews in this issue by Rowland Young.

the same area in violation of Section 3 of that statute, and (3) substantially lessening competition by acquisition of the assets of Embassy Dairy in violation of Section 7 of the Clayton Act.

The association contended that Section 6 of the Clayton Act and Sections 1 and 2 of the Capper-Volstead Act completely exempted it from the charges. The District Court dismissed the Section 2 charge, where the association was not alleged to have acted in combination with others, but it upheld the Sherman Act Section 3 and the Clayton Act Section 7 charges. The court concluded that agricultural co-operatives were entirely exempt from the antitrust laws so long as they do not enter into conspiracies or combinations with others who are not producers of agricultural commodities. Both sides appealed directly to the Supreme Court.

Speaking for a unanimous Court, Mr. Justice BLACK sustained all three counts of the indictment. The Court recalled that the argument that the Capper-Volstead Act gave the Secretary of Agriculture primary jurisdiction upon a finding that a co-operative has monopolized trade had been rejected in *United States* v. *Borden*, 308 U. S. 188, and it announced its adherence to the *Borden* holding.

The purpose of the exemption of farmer co-operatives in the Clayton Act, according to the Court, was to allow farmers to act together in co-operative associations without the associations as such being held or construed to be illegal combinations or conspiracies in restraint of trade. The associations are exempt as long as they are carrying out their legitimate objects, the Court declared, but the statute does not give full freedom to engage in predatory trade practices at will. The Court then examined each of the three counts and held that each count contained allegations which, if proved, would establish a violation.

The cases were argued by Herbert A. Bergson and William J. Hughes, Jr., for the association and by Philip Elman for the United States.

Constitutional law . . . *discrimination*

United States v. *Alabama*, 362 U. S. 602, 4 L. ed. 2d 982, 80 S. Ct. 924, 28 Law Week 4382. (No. 398, decided May 16, 1960.) *On writ of certiorari to the United States Court of Appeals for the Fifth Circuit. Judgment vacated and cause remanded.*

This was a suit against the Board of Registrars of Macon County, Alabama, for declaratory and injunctive relief. The petitioner alleged a course of discriminatory policies intended to deprive Negroes of their voting rights. The State of Alabama was later joined as a defendant.

The District Court dismissed the complaint, holding that the individual respondents, having resigned as Registrars, could not be sued in their individual capacities, that the Board itself was not a suable legal entity, and that the Civil Rights Act of 1957 did not authorize this action against the state. The Court of Appeals affirmed.

The Supreme Court vacated the judgment and remanded. The Court's brief *per curiam* opinion noted that the Civil Rights Act of 1960 had become law on May 6, and Section 601(b) of that statute expressly authorizes actions such as this to be brought against a state. In holding that the District Court had jurisdiction to entertain the suit, the Court said, it did not reach or intimate any view upon "any of the issues decided below, the merits of the controversy, or any defenses, constitutional or otherwise, that may be asserted by the State".

The case was argued by Solicitor General Rankin for the United States and by Gordon Madison and Nicholas S. Hare for respondents.

Constitutional law . . . *loyalty oaths*

Nostrand v. *Little*, 362 U. S. 474, 4 L. ed. 2d 892, 80 S. Ct. 840, 28 Law Week 4265. (No. 342, decided May 2, 1960.) *On appeal from the Supreme Court of the State of Washington. Judgment vacated and cause remanded.*

This was a suit for a declaratory judgment to test the constitutionality of a Washington statute that requires every public employee in that state to subscribe to an oath that he is not a member of the Communist Party or any other subversive organization. The Court remanded in order to allow the state supreme court to determine whether the statute afforded a hearing at which the employee could explain or defend his refusal to take the oath.

The Supreme Court announced its action in a brief *per curiam* opinion which pointed out that the Washington court had recently overturned an ordinance because it established a presumption of guilt without affording the accused a hearing.

Mr. Justice DOUGLAS, joined by Mr. Justice BLACK, wrote a dissenting opinion which argued that the remand was a "useless act". The statute provides that refusal to take the oath "on any grounds" is cause for "immediate termination" of employment, the dissent said, and therefore a hearing could serve no function. Since the state court had already held that the oath requirement included the element of scienter, a hearing would not be germane to the question whether under the statute the teacher had the right to refuse to take the oath.

The case was argued by Francis Hoague and Solie M. Ringold for appellants and by Herbert H. Fuller for appellee.

Criminal law . . . *procedure*

Schaffer v. *United States*, *Karp* v. *United States*, 362 U. S. 511, 4 L. ed. 2d 921, 80 S. Ct. 945, 28 Law Week 4308. (Nos. 111 and 122, decided May 16, 1960.) *On writs of certiorari to the United States Court of Appeals for the Second Circuit. Affirmed.*

These cases raised questions of the propriety of joinder of defendants under Rule 8(b) of the Federal Rules of Criminal Procedure and whether shipments of stolen goods in interstate commerce could be aggregated as to value in order to meet the statutory minimum of $5,000 prescribed by Section 2314 of 28 United States Code. The Court affirmed the convictions.

The indictment charged transportation in interstate commerce of goods known to have been stolen and having a value in excess of $5,000. Three of the seven original defendants, the Stracuzzas, who were the ringleaders in the plot, either pleaded guilty or the case against them was nolle prossed at the trial. The other four defendants

were tried simultaneously in a single trial. On motion for acquittal at the close of the Government's case, the court dismissed a conspiracy count, but denied a motion as to the substantive counts, finding that no prejudice would result from a joint trial. Each of the four was found guilty and was fined and sentenced to prison. The Court of Appeals affirmed.

The Supreme Court affirmed, speaking through Mr. Justice CLARK. In holding that there was no impropriety in the joint trial, the Court noted that joinder of defendants is permissible under Rule 8(b) "if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses". The Court saw no prejudice in the failure to grant a severance after dismissal of the conspiracy charge. The four petitioners each participated in some steps of the transactions in stolen goods, the Court said, although each was involved in separate interstate shipments. The substantive charges of the indictment employed almost identical language and alleged violations of the same criminal statute during the same period and in the same manner. The proof was carefully compartmentalized as to each petitioner, and the judge's charge to the jury meticulously set out the evidence as to each petitioner and admonished the jury that they were not to "take into consideration any proof against one defendant and apply it by inference or otherwise to any other defendant". Further, said the Court, both the trial court and the Court of Appeals affirmatively found that there was no prejudice in the joint trial.

As for the argument about aggregation of the values of the shipments to meet the $5,000 minimum, the Court declared that a "sensible reading of the statute properly attributes to Congress the view that where the shipments have enough relationship so that they may properly be charged as a single offense, their value may be aggregated".

Mr. Justice DOUGLAS wrote a dissenting opinion in which the CHIEF JUSTICE, Mr. Justice BLACK and Mr. Justice BRENNAN concurred. The dissent argued that once the conspiracy count was dismissed, the court had before it the same problem as if the prosecution had sought to try before a single jury separate indictments against defendants who had been charged with similar crimes but which were wholly unrelated. Two of the defendants had shipped goods to Pennsylvania, one to Massachusetts, and another to West Virginia. None of these shipments had any connection with the others, and the only connection between the four defendants was that each dealt with the Stracuzzas, the dissent argued.

The cases were argued by Jacob Kossman and Harris B. Steinberg for petitioners and by John F. Davis for respondent.

Evidence . . .

testimony of spouse

Wyatt v. *United States*, 362 U. S. 525, 4 L. ed. 2d 931, 80 S. Ct. 901, 28 Law Week 4304. (No. 119, decided May 16, 1960.) *On writ of certiorari to the United States Court of Appeals for the Fifth Circuit. Affirmed.*

Although it recognizes the "continued validity" of the common law rule that a wife cannot testify against her husband, this decision held that the privilege did not apply in this prosecution for violation of the Mann Act. The Court sanctioned admission of the testimony of the woman involved although she had since married the accused and was unwilling to testify against him.

Mr. Justice HARLAN, speaking for the Court, pointed out that even the common law recognized an exception to the rule against admission of adverse testimony by a spouse in cases of offenses committed by the party against his spouse. The Court declared that the privilege did not belong to the accused in this case because "it cannot be seriously argued that one who has committed this 'shameless offense against wifehood,' . . . should be permitted to prevent his wife from testifying to the crime by invoking an interest founded on the marital relation or the desire of the law to protect it".

The Court had more trouble with the question whether the wife could refuse to testify. The defendant argued that when the wife has chosen not to "become the instrument" of her husband's downfall, it is her own privilege that is in question and the reason for according it to her in the first place are fully applicable. The Court replied that "judgement and policy" behind the Mann Act made the privilege unavailable here. "A primary purpose of the Mann Act was to protect women who were weak from men who were bad", the Court said, and it was to be assumed that a man who could induce a woman to enter a life of prostitution —"and the Act rests on the view that he can"—could, at least as easily, persuade one who has already fallen victim to his influence that she must not testify against him.

The CHIEF JUSTICE wrote a dissenting opinion in which Mr. Justice BLACK and Mr. Justice DOUGLAS joined. The dissent declared that the Court's evaluation of the "mental state of the wife" found no support in the record and could not be justified by the legislation, and it argued that if the privilege was to be abandoned in Mann Act cases it was for Congress to say so.

The case was argued by Robert R. Rissman and Fred Okrand for petitioner and by Roger G. Connor for respondent.

Habeas corpus . . .

mootness

Parker v. *Ellis*, 362 U. S. 574, 4 L. ed. 2d 963, 80 S. Ct. 909, 28 Law Week 4321. (No. 38, decided May 16, 1960.) *On writ of certiorari to the United States Court of Appeals for the Fifth Circuit. Judgment vacated with directions to dismiss.*

This decision ordered dismissal of a petition for a writ of habeas corpus because the petitioner was released from a Texas prison having served his full sentence with time off for good behavior. The Court ruled that the case had become moot. The petitioner contended that his conviction of forgery was a denial of due process because he had had no counsel at the trial.

A *per curiam* opinion declared that the purpose of habeas corpus being to inquire into the legality of detention, the only judicial relief authorized by the habeas corpus statute was the discharge of the prisoner or his enlargement on bail.

Mr. Justice HARLAN and Mr. Justice CLARK noted that they considered the case moot on the further ground that the petitioner had been convicted of felonies in other states and under Texas law any one of those convictions would mean the loss of his civil rights, and therefore there was no "case or controversy" to support the Court's jurisdiction.

The CHIEF JUSTICE, joined by Mr. Justice BLACK, Mr. Justice DOUGLAS and Mr. Justice BRENNAN, wrote a dissenting opinion which took the position that the habeas corpus act gave the courts a broad grant of authority to "dispose of the matter as law and justice require": "Under the circumstances of this case, 'law and justice require' that the patent invalidity of Parker's conviction be proclaimed." Further, the dissent argued, conviction of a felony imposes a status that makes the convict vulnerable to future sanctions through new civil disability statutes and affects his reputation and economic opportunities.

Mr. Justice DOUGLAS wrote a dissenting opinion in which the CHIEF JUSTICE joined. This opinion argued that the petitioner was in custody when the petition for certiorari was filed and that judgment should have been entered *nunc pro tunc*.

The case was argued by Frank W. Wozencraft for petitioner and by Leon Pesek for respondent.

Labor law . . .
coercion by union

Communications Workers of America, AFL-CIO v. *National Labor Relations Board*, 362 U. S. 479, 4 L. ed. 2d 896, 80 S. Ct. 838, 28 Law Week 4291. (No. 418, decided May 2, 1960.) *On writ of certiorari to the United States Court of Appeals for the Sixth Circuit. Judgment modified and affirmed.*

The National Labor Relations Board found that the petitioner unions had coerced employees of the Ohio Consolidated Telephone Company in their right to refrain from participation in a strike and entered an order requiring the unions to cease and desist "from *in any manner* restraining or coercing employees of the Ohio Consolidated Telephone Company *or any other employer* in the exercise of rights guaranteed in Section 7" of the National Labor Relations Act. The Court of Appeals enforced the order deleting the words "in any manner".

In a *per curiam* opinion, the Supreme Court affirmed, modifying the order by striking the words "or any other employer". Petitioners were not found to have engaged in violations against the employees of any other employer, the Court said, and there was no justification or necessity for extending the coverage to employees of other employers.

The case was argued by J. R. Goldthwaite, Jr., for petitioners and by Dominick L. Manoli for respondent.

Labor law . . .
limitations

Local Lodge No. 1424, International Association of Machinists v. *National Labor Relations Board*, 362 U. S. 411, 4 L. ed. 2d 832, 80 S. Ct. 822, 28 Law Week 4274. (No. 44, decided April 25, 1960.) *On writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit. Reversed.*

This case involved the meaning of the six-month statute of limitations contained in Section 10(b) of the National Labor Relations Act. The section provides that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board . . ."

On August 10, 1954, the petitioner Bryan Manufacturing Company entered into a collective bargaining agreement with petitioner Local Lodge No. 1424, a unit of the International Association of Machinists. The agreement contained a "recognition" clause, recognizing the union as the exclusive bargaining agency for all employees of the company, and a "union security" clause, by which all employees were given forty-five days to join the union. At the time the agreement was executed, the union did not represent a majority of the employees covered by it; the Board has held this to be an unfair labor practice, and the maintenance of such an agreement is a continuing violation of the statute—the majority status of the union later is immaterial, being regarded as the attributable to the earlier unlawful assistance received from the original agreement.

An unfair labor charge was filed with the Board ten months after execution of the original agreement. Over the contention by the petitioners that the complaint was barred by the six-month limitations provision, the Board held that the complaint was not barred and the Court of Appeals affirmed.

The Supreme Court reversed, speaking through Mr. Justice HARLAN. The Court said that the purposes of Section 10(b) require a distinction between two different situations: (1) where occurrences within the six-month period constitute, as a substantive matter, unfair labor practices, in which case the section does not ordinarily bar the use in evidence of earlier events to shed light on the true character of matters occurring within the six-month period; (2) where conduct occurring within the period can be charged to an unfair practice only through reliance on an earlier unfair labor practice. This case fell in the latter category, the Court decided, since the agreement and its enforcement were both lawful on their face and could not constitute an unfair labor practice except by reliance upon the illegality of the original execution, an event that was barred by the statute.

The Court felt that the doctrine of continuing violation was of no avail here. To hold that keeping the agreement in effect was a continuing violation, it explained, would be to support "a lifting of the limitations bar by a characterization which becomes apt only when that bar has already been lifted". The execution of the agreement was a *suable* unfair labor practice only for six months following its execution. Otherwise, said the Court, there would in effect be no limitations period at all and this would hardly promote the purpose of the statute of promoting "industrial peace".

Mr. Justice FRANKFURTER wrote a dissenting opinion that argued that the Court was reading the section as if it barred complaints "based upon any unfair labor practice *having had its inception* more than six months prior" instead of "based upon any unfair labor practice *occurring* more than six months prior". He proposed a "controlling

analogy" which would have treated the limitations period here like a conspiracy entered into before a statutory period but kept actively alive during the period.

Mr. Justice WHITTAKER wrote a dissenting opinion in which Mr. Justice FRANKFURTER joined. This opinion argued that the Court was negating the "continuing offense" doctrine. The General Counsel of the Board made a prima facie case of continuing violations of the law within the six months' period, Mr. Justice WHITTAKER said, simply by putting forth evidence showing that the employees were required to become members of the union and to submit to deduction of dues from their wages without asking them for authorization and without any election.

The case was argued by Bernard Dunau for petitioners and by Norton Come for respondent.

Water and watercourses . . . *obstructions*

United States v. *Republic Steel Corporation*, 362 U. S. 482, 4 L. ed 2d 903, 80 S. Ct. 884, 28 Law Week 4312. (No. 56, decided May 16, 1960.) *On writ of certiorari to the United States Court of Appeals for the Seventh Circuit. Reversed.*

This was a suit to enjoin the respondent from depositing industrial solids in the Calumet River without a permit from the Army's Chief of Engineers. Respondent uses large quantities of water from the river in its steel mill, returning it through numerous sewers. The trial court found that the processes used create industrial waste which is deposited on the bottom of the river, reducing the depth of the channel from twenty-one to as little as twelve feet. Respondents had refused, since 1951, the demand of the Corps of Engineers that they dredge the river in the vicinity of their plant.

Reversing the Court of Appeals, which had dismissed the complaint filed by the Department of Justice, the Supreme Court held that the industrial deposits created an "obstruction" within the meaning of Section 10 of the Rivers and Harbors Act of 1899. The Court's opinion was written by Mr. Justice DOUGLAS.

The Court traced the history of federal control over obstructions to the navigable capacity of rivers to *Willamette Iron Bridge Co.* v. *Hatch*, 125 U. S. 1 (1888), which held that "there is no common law of the United States" that prohibits obstruction in navigable streams. The 1899 act was a revision of the 1890 statute that followed the *Willamette Iron Bridge Co.* case. The Court said that it seemed plain that Section 10 of the act was applicable here. That section outlawed "any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States". The Court rejected a contention that *obstruction* meant a *structure*, saying that this was at odds with the context and the legislative history. *Sanitary District* v. *United States*, 266 U. S. 405 (1925), held that withdrawal of water from Lake Michigan through the Chicago River, reducing the level of the lake, was a violation of the act, the Court said, and a concept of "obstruction" broad enough to include that seems plainly adequate to cover this case.

The Court also refused to hold that the industrial waste fell into the category of "refuse matter . . . flowing from streets and sewers and passing therefrom in a liquid state", excepted from the mandate of the statute by Section 13. The particles in the present obstruction, the Court ruled, are in suspension, not solution, and matter in suspension, which does not undergo chemical change, is not saved by the exception clause.

Mr. Justice FRANKFURTER attached a memorandum dissenting, saying that he would "go a long way to sustain the power of the United States, as *parens patriae*, to enjoin a nuisance that seriously obstructs navigation . . . But that road to judicial relief is . . . barred by the Rivers and Harbors Act of 1899" for the reasons set forth in Mr. Justice HARLAN's dissent.

Mr. Justice HARLAN wrote a dissenting opinion in which Mr. Justice FRANKFURTER, Mr. Justice WHITTAKER and Mr. Justice STEWART joined. The dissent discussed the history and language of the Rivers and Harbors Act and arrived at an opposite conclusion from that of the Court. The dissent also objected to the Court's holding, somehow "inferred" from the statute, that injunctive relief was authorized.

The case was argued by Solicitor General Rankin for petitioner and by Raymond T. Jackson and Paul R. Conaghan for respondents.

What's New in the Law

The current product of courts, departments and agencies

George Rossman . EDITOR-IN-CHARGE

Richard B. Allen . ASSISTANT

Attorneys . . .
privilege and discipline

The New York Court of Appeals has affirmed the disbarment of a lawyer for his refusal to answer questions during a "judicial inquiry" into possible improper solicitation of personal injury and death cases. The disbarment order had been entered by the Appellate Division, Second Department (9 A.D. 2d 436, 195 N.Y.S. 2d 990—46 A.B.A.J. 551; May, 1960).

The "judicial inquiry and investigation", a statutory procedure in New York, was being conducted by a Supreme Court justice pursuant to order of the Appellate Division, which has professional disciplinary jurisdiction in New York State. The counsel for the inquiry had put in evidence 228 retainer statements filed by the attorney and seventy-six filed by his firm during a five-year period, and was proceeding to ask the attorney embarrassing questions concerning his possible solicitation practices when he declined to answer under the privilege against self-incrimination contained in the New York Constitution.

Agreeing with the reasoning of the Appellate Division, the Court of Appeals declared that the attorney had the right to assert his constitutional privilege to withhold incriminating answers and that he could not be forced to waive this immunity, but that since he was an officer of the court as an attorney "the court which was charged with control and discipline of its officers had its own right to demand his full, honest and loyal cooperation in its investigations and to strike his name from the rolls if he refused to cooperate".

The Court emphasized that a lawyer occupies a special position: his professional life is subject to control by courts, and membership in the Bar is "a privilege burdened with conditions". Continued the Court:

> The key word is "duty" and the imposition on a lawyer by tradition and positive law of strict and special duties produces this situation where, at the very time that he is exercising a common privilege of every citizen in refusing to answer incriminating inquiries, he is failing in his duty as a lawyer and endangering his professional life. Breach of the special duty brings a special penalty. . .

One judge dissented. He conceded that a lawyer has "strict and special duties" but he did not think that a lawyer's refusal on constitutional grounds to answer incriminating questions amounted to a violation of the duty. He said that the exercise of a constitutional privilege could not be a breach of duty to the court. He remarked, furthermore, that the lawyer's non-cooperation would not harm the inquiry because it appeared there was independent information indicating the attorney's participation in professional misconduct.

(*In re Cohen*, Court of Appeals of New York, April 1, 1960, Desmond, J., 7 N. Y. 2d 488, 199 N.Y.S. 2d 658, 166 N.E. 2d 672.)

Evidence . . .
prejudicial statements

The Court of Appeals for the Second Circuit has reversed and remanded a wrongful-death case on the plaintiff's appeal that she was awarded inadequate damages. The ground of the reversal was that the trial court had improperly admitted testimony which may have adversely affected the jury's verdict for damages.

The widow, as executrix, had sought damages of $350,000, and the jury returned a verdict for $24,000, of which $15,000 was allocated to the widow and the remainder to a minor child of the decedent by a former marriage.

The Second Circuit found two bases for concluding the plaintiff's case may have been prejudiced. One was the trial judge's admission of considerable cross-examination testimony concerning the plaintiff's initial acquaintanceship with the decedent while she was still married and whether the decedent had lived at her apartment prior to their marriage. This testimony was admitted on the theory that it showed the decedent's personal habits and character that were proper considerations in determining his future earnings and support of family. But the Second Circuit concluded that the testimony was irrelevant to the question of pecuniary loss, which, in addition to funeral expenses, is the only loss recoverable under the District of Columbia wrongful death act applicable to the case. It conceded that personal habits and qualities are to some degree relevant considerations. But it added: "The manner in which men choose to conduct their personal lives very often has little bearing on the way that they manage their business affairs. In the absence of some preliminary showing to the contrary, a court ought not to suppose that evidence of the former is of utility in determining the latter."

The other error pointed out by the Court was the reading of a portion of

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Editor's Note: Virtually all the material mentioned in the above digests appears in the publications of the West Publishing Company or in The United States Law Week.

a deposition in which a former business associate of the decedent denied that he had stated to an investigator that the decedent was an alcoholic. The fault here, the Court said, was permitting the jury to hear in such a second-handed fashion about derogatory statements supposedly made to the investigator, without having the investigator testify.

(*St. Clair* v. *Eastern Air Lines, Inc.*, United States Court of Appeals, Second Circuit, June 2, 1960, Lumbard, J.)

Husband and Wife . . . *agreements*

The Supreme Court of Ohio has held that an oral ante-nuptial agreement can be validated by reducing it to writing after the marriage. The Court ruled that the subsequent written agreement, which referred specifically to the ante-nuptial agreement, was sufficient to remove it from the statute of frauds.

The case arose when a widow claimed her statutory year's support from the husband's estate. This was one of the rights she had waived in the written agreement. The probate court ruled against the widow, but the intermediate appellate court held in her favor. It concluded that the oral ante-nuptial agreement was in contemplation of marriage and that the consideration—marriage—had been eliminated when the marriage took place; therefore the oral agreement could not be reduced to writing because of a statutory provision that a husband and wife cannot contract to alter their legal relationships.

But the Ohio Supreme Court looked at the problem differently. It declared that agreements within the statute of frauds are not "void" or "invalid", but only unenforceable "unless some memorandum or note thereof shall be in writing". The Court pointed out that this agreement had been reduced to writing and the writing specifically referred to the oral ante-nuptial agreement. It was not necessary, the Court said, for the reduction to writing to have occurred before the marriage.

(*In re Estate of Weber*, Supreme Court of Ohio, May 4, 1960, Herbert, J., 170 O.S. 567, 167 N.E. 2d 98.)

Probation . . . *pursuing an occupation*

The Court of Appeals for the Fifth Circuit has agreed with a district-court judge that four professional gamblers can't have their stakes and eat them too.

The quartet pleaded guilty to evading federal gambling taxes and the trial judge offered them a choice between jail sentences or probation carrying a condition that they give up gambling. They chose the latter, but later regretting it, appealed on the ground that the judge abused his discretion in attaching the no-gambling condition to their probationary periods. They complained that the judge had really put them out of business and that this was a short-sighted thing to do because their continued activities would contribute to federal revenues. After all, they said, the federal gambling tax statute is not an instrument for moral reform.

But the Fifth Circuit thought the judge had acted properly. The defendants made their choice, it noted, and their misgivings should have occurred to them sooner. "There is nothing unusual", the Court remarked, "in conditioning probation on the defendant obeying the law, state law or federal law... Professional gambling got these defendants into trouble. It seems a fair exercise of judicial discretion therefore for the district court to proscribe gambling."

(*Barnhill* v. *U. S.*, United States Court of Appeals, Fifth Circuit, June 8, 1960, Wisdom, J.)

Public Employment . . . *arbitrary refusal*

Los Angeles acted arbitrarily in refusing city employment to a qualified applicant on the ground that eleven years before she had refused to take a state loyalty oath, the Supreme Court of California has decided.

The applicant was discharged by Los Angeles County in 1948 after she had refused to sign the loyalty oath then required of public employees in California. In 1958 and 1959 she fully qualified for two civil service positions with the city and was ready to sign the oath then required, which was different from that in effect in 1948. She further stated that she was not and never had been a Communist or a member of the Communist Party. She was denied employment, however, on the ground of the "nature of the discharge from another governmental agency".

In ordering the civil service commission's determination set aside, the Court held that the right to public employment is protected against deprivation by arbitrary means, and it went on to rule that the commission had acted arbitrarily in this case. In the first place, the Court declared, the applicant was qualified for the employment in all respects. As to the oath requirement, it noted that the nature of the oath, rather than the applicant's views, had changed. "Thus", it continued, "the question of her disqualification at an earlier date for failure to swear to the oath then required, has no more bearing on her present qualification than would her failure to meet prior educational requirements since abandoned."

On an additional ground, the Court said that it could not assume, without arbitrarily doing so, "that one who might have been disqualified for reasons of prior associations reflecting on loyalty will forever after remain disqualified for that reason".

The Court rejected claims of the civil service commission that its refusal to hire the applicant stemmed from other unfavorable evidence against her. It pointed out that she was not confronted with other testimony nor given an opportunity to answer. In upsetting the commission's determination, it remanded for further hearings on these matters, should the commission desire.

(*Wilson* v. *City of Los Angeles*, Supreme Court of California, May 4, 1960, White, J., 54 A.C. 53, 4 Cal. Rptr. 489, 351 P. 2d 761.)

Radio and Television . . . *equal-time headaches*

The equal-time provision of §315 of the Communications Act, 47 U.S. C.A. §315, does not require a radio and television station whose regular weather broadcaster happens to become a political candidate to give his opponent equal time on the broadcast-

ing facilities. This is the decision of the Federal Communications Commission, now affirmed by the Court of Appeals for the Fifth Circuit.

The case concerned Texas stations KWTX and KWTX-TV, whose weatherman, Jack Woods, became a candidate for the Texas Legislature. Mr. Woods had several radio and television appearances daily, but they were concerned only with weather news and forecasts and he was identified only as the "TX Weatherman". His opponent for the Legislature claimed equal time on behalf of his own candidacy.

The Court noted that §315 of the Communications Act requires a broadcasting licensee if it permits any legally qualified candidate to use the station to "afford equal opportunities to all such other candidates for that office in the use of such broadcasting station". The Court pointed out, however, that Congress amended the section in September of 1959, as a result of the so-called "Lar Daly" case, and added a proviso that a "bona fide newscast ... shall not be deemed to be use of a broadcasting station ..." It concluded that the broadcasts of Mr. Brooks were bona fide efforts to present weather news and therefore outside the statute. "Certainly the facts do not indicate any favoritism on the part of the station licensee or intent to discriminate among candidates", it said.

(*Brigham* v. *Federal Communications Commission*, United States Court of Appeals, Fifth Circuit, April 19, 1960, *per curiam*, 276 F. 2d 828.)

Segregation . . . *pupil assignment*

The refusal of the school board of Alexandria, Virginia, to transfer five Negro pupils from all-colored schools has been affirmed by the Court of Appeals for the Fourth Circuit. Meanwhile, in another segregation case, the Fourth Circuit reinstated a complaint charging racial discrimination at the Greenville Municipal Airport, in South Carolina.

In the school case the validity of the board's action under its own pupil-assignment resolution was at issue. In October, 1958, the board adopted a plan, to be operated on a racially non-discriminatory basis, employing six criteria to be used in considering the assignment of pupils or applications for transfer. Fourteen Negro pupils applied for transfer from colored to white schools, but the board rejected all the applications. The district judge revised this by granting the applications of nine and rejecting the remaining five. Of the six criteria only two were used by the judge in denying these transfers: poor scholarship and the fact that the five lived closer to the colored school than the white.

The Court ruled the record in the case did not support the contention that the assignment criteria and the action of the school board were designed and applied in such a way as to continue unconstitutional racial segregation. It readily conceded that if there were a showing that the assignment "criteria were applied in such a way as to circumvent the constitutional requirement that a state shall not maintain its school system on a racially segregated basis", then it would strike down the action, but it found the application of the assignment system fair as to the five Negro pupils appealing.

The Court pointed out that the district court hearing was held only four days after Virginia's so-called "massive resistance" laws were declared unconstitutional and that until that time the school board had been in a delicate position: had it permitted any bi-racial assignments, the schools would have been seized and closed by the state. Thus, the Court explained, the assignment system had not had a chance to operate. And the fact that its first use was with respect to Negro pupils did not invalidate it. After all, the Court said, the system had to start with someone.

The Court warned that it would not tolerate any departure from fair and non-discriminatory application of the assignment system to all pupils entering the school system or applying for transfer. It noted that the appeal seemed to be based "not so much upon what is shown to have happened, as upon what they fear will happen".

(*Jones* v. *School Board of the City of Alexandria, Virginia*, United States Court of Appeals, Fourth Circuit, April 20, 1960, *per curiam*, 278 F. 2d 72.)

In the airport case the plaintiff, a Negro civil service employee of the Air Force, alleged in his complaint that he was told by the manager of the Greenville Municipal Airport to move from the terminal to "a waiting room for colored folks over there". The prayer was for an injunction enjoining exclusion of himself and other Negroes similarly situated from the general waiting room. The district court dismissed the complaint for failure to state a claim upon which relief could be granted.

The Fourth Circuit concluded that the complaint was entitled to a more liberal reading. It thought the complaint stated an allegation that the plaintiff was excluded from the general waiting room because of his race and that it was inferable from the fact that a separate Negro waiting room was maintained that other Negroes had been similarly treated.

The Court also ruled that the Greenville Airport Commission, which operated the airport, was an agency of the state and that the action of its manager was state action within the ambit of the Fourteenth Amendment.

(*Henry* v. *Greenville Airport Commission*, United States Court of Appeals, Fourth Circuit, April 20, 1960, *per curiam*.)

Unauthorized Practice . . . *title companies*

After suffering a setback last year in the lower court (55 N. J. Super. 230, 150 A. 2d 496—45 A.B.A.J. 854; August, 1959), the New Jersey State Bar Association has come up with a resounding victory in an unauthorized practice case involving a title insurance company's activities.

After a careful and exhaustive review of decided cases, the Supreme Court of New Jersey curtailed the activities of the title guaranty company in three fields:

(1) With respect to the preparation of instruments in connection with transactions in which the title company is mortgagee, the Court held that the company "may justly be permitted to draw the bond and mortgage and the mortgagor's affidavit of title provided it imposes no charge on the purchaser for such services". The Court went on

immediately to find that the fees paid by mortgagors for "search and title abstracting" were far in excess of the title company's cost for title search and abstract and that therefore purchasers were paying a charge for the services. The conclusion is that the title company must reduce those charges to bring itself within the limits of the court's decision.

(2) With respect to the preparation of instruments in connection with transactions in which the title company acts for other lending institutions in placing mortgages, the Court ruled that the drawing of the instruments "is clearly within the traditional definition of the practice of law and nonetheless so where the drawing consists in the filling in and completion of legal forms". It agreed with decisions that have concluded that no legal conveyancing form is so simple that it can be regularly prepared by an unqualified layman.

(3) With respect to the title company's "lawful business", the Court said that it could insure titles and cause title searches and abstracts to be made. It agreed also that the company could have "a legal representative to protect its interests at the title closings". The real difficulty arises, the Court continued, when the title company clears title objections itself and imposes for that service a separate charge in excess of the actual cost of the title search and abstract. Forbidding this activity, the Court stated:

> ... We hold the opinion that while the title company may properly voice its objections to the title and not issue its title policy or lend its money on mortgage until the objections have been removed, it may not participate in the preparation of legal instruments or in the taking of other legal steps necessary to remove the objections to the title or to cure the defects therein.

The Court had no difficulty rejecting two other arguments made by the title company. One was that its activities were "at least impliedly" authorized by statutes. To answer this the Court pointed to the New Jersey Constitution of 1947 which grants the Court exclusive jurisdiction over admissions to the Bar. The other argument was that public policy compelled the conclusion that the title company's activities were not the practice of law. The Court thought just the opposite might be true. "To the extent", it declared, "that this action serves to remove unwarranted charges imposed by the title company on purchasers and to encourage parties to obtain the important protection of independent counsel, the public interest will not be disserved but on the contrary will be significantly advanced."

(*New Jersey State Bar Association* v. *Northern New Jersey Mortgage Associates*, Supreme Court of New Jersey, May 23, 1960, Jacobs, J., 161 A. 2d 257.)

What's Happened Since . . .

On June 27, 1960, the Supreme Court of the United States:

DENIED CERTIORARI in *Goldfine* v. *U. S.*, 268 F. 2d 941 (45 A.B.A.J. 1076; October, 1959), leaving in effect the decision of the Court of Appeals for the First Circuit affirming convictions of Bernard Goldfine and his bookkeeper, Mildred Paperman, for refusing to produce business records for inspection by the Internal Revenue Service.

VACATED JUDGMENT in *United Railroad Workers Division of Transport Workers Union* v. *Baltimore & Ohio Railroad Company*, 271 F. 2d 87 (45 A.B.A.J. 1311; December, 1959). The Court of Appeals for the Second Circuit had held that a railroad may, as a "minor dispute" under the Railway Labor Act, eliminate positions considered by management to be unnecessary without prior consultation with the union and that the positions may remain vacant while the dispute over them is being determined by the National Railway Adjustment Board. In a short order the Supreme Court vacated the judgment and remanded the case for reconsideration in the light of *Brotherhood of Locomotive Engineers* v. *Missouri-Kansas-Texas Railroad Company*, 80 S. Ct. 1326.

AFFIRMED (8-to-1) the decision of the Court of Appeals for the Third Circuit in *Hertz Corporation* v. *U. S.*, 268 F. 2d 604 (45 A.B.A.J. 972; September, 1959), that a car-rental company may not use the declining-balance method of depreciation for cars it held for an average of twenty-six months, in view of the requirement in §167(c) of the Internal Revenue Code of 1954 that that method of computing depreciation may be used only for assets "with useful life of three years or more". The Supreme Court held that "useful life" means the period in which the asset is actually used by taxpayer rather than the total economic life of the asset. The Court also refused to invalidate regulations prohibiting use of the declining-balance method to depreciate assets below their salvage value.

Department of Legislation

Charles B. Nutting, Editor-in-Charge

Practical means of teaching law students to draft legislation are difficult to devise. In the following article Mr. Haley describes how the Willamette Law School has taken advantage of its unusual location to develop an outstanding program in this field.

Legislative Workshop at Willamette

by Sam R. Haley, Legislative Counsel, State of Oregon

Hoping to improve the quality of statute draftsmanship and to promote an understanding and intelligent use of statutes, the College of Law, Willamette University, Salem, Oregon, started its legislative workshop course in 1954. The objectives of the course are not unusual; perhaps the manner and atmosphere in which they are pursued are. The unique characteristics of the workshop arise out of the fact that the College of Law and its students are right across the street from Oregon's Capitol and the Legislative Counsel's office.

Laboratory Atmosphere

The legislative workshop is a learning-by-doing course. The students learn about the development, drafting and application of statutes and about state legislative procedures and organization by participating in the drafting of bill requests actually received by the Legislative Counsel's office and by observing agencies of the three branches of state government as they deal with statutes. Supervision and instruction are carried on by the Legislative Counsel, whose office furnishes a bill-drafting service to state legislators and to state agencies and also edits, indexes, annotates and publishes *Oregon Revised Statutes*. The Legislative Counsel's office is a part of Oregon's legislative branch and is under the control of a joint legislative committee.

Determining Purpose of Bill and Methods of Accomplishing Purpose

The first step in drafting a bill, as in the case of any legal instrument, is to determine exactly what its purpose is. What is the requester, who may be a legislator or a state agency head, trying to do and what are the available methods for accomplishing his purpose? The student has not in most cases participated in the bill request-taking procedure; and even if he had, he usually doesn't have sufficient background at that point to ask the questions that he probably needs to ask. But he does begin to appreciate the importance of getting the facts as completely and as soon as his experience permits. A student is not supposed to supply the substance or policy of a bill, but he is required to draft in proper form provisions to carry out requested objectives. If initially or as the drafting proceeds the requested objectives appear incomplete or hazily expressed, the student checks with the requester. Already the student is beginning to learn something about legislative intent, or the absence thereof. Too, he acquires some realization of the sources of statute law and the significance of its context at the time of enactment.

Pointing Out Alternatives and Policy Questions

The second step requires careful consideration of formal constitutional requirements (such as whether the body of the bill relates to one subject) and also substantive constitutional requirements, both state and federal. Students soon discover that an invalid bill, though otherwise perfectly drafted, fails to accomplish the requester's objectives. Furthermore, an invalid bill, they learn, often proves to be costly and embarrassing. Students ordinarily are not expected to pass on the substantive constitutional requirements; but they are expected to raise any questions they see and, if possible, to indicate other means by which the requester's objectives can be accomplished constitutionally.

Visualizing the variety of valid possibilities and their acceptibility to the requester, even if only attempted by the student, offers challenging opportunities for analysis, synthesis and perception. Students learn that starting from scratch in formulating possibilities, or in drafting, can be advantageously avoided, if they can use a law or bill already in existence as a pattern. This saves time, promotes an over-all consistency of treatment of similar problems and usually decreases the probability of unanticipated results. Also, an educated appraisal of others' views often points up problems and solutions thereto that might otherwise have been overlooked by the students. The procedure in an existing statute, if tried and tested, usually can be depended upon to be workable. The students may verify workability of an existing statute by conferring with administrators and others affected. The students use the Legislative Counsel's library, the State Library and the Supreme Court Library to locate other similar Oregon statutes or bills, the constitutions, statutes and bills of other states and uniform and model acts.

Determining State of Existing Law and Necessary Changes

In performing Step 3, the student tries to become an expert on the constitutional provisions, statutes, court decisions and administrative interpretations relating to the subject of the bill. Even if the student doesn't become an authority on the subject of his bill, he at least begins to realize that his bill, though a unit itself, is but a part of a larger body of statute law. *In pari*

materia, instead of being a mysterious phrase, becomes meaningful to a student not only in drafting but also in interpreting statutes. He asks himself, "Will the bill conflict with or duplicate existing statutes?" As a draftsman he seeks to avoid repeals or amendments by implication; and, as a future lawyer, he begins to understand why they occur and what effect legislative history may have on statutory interpretation. Through performing Step 3 activities, students learn to locate faster and more accurately the existing statutes. The classification and arrangement of statutes, the cross references, index and annotations, the tables and the legislative histories all become helpful and familiar tools.

Planning the Organization and Arrangement of Provisions

As the student is completing the first three steps in the drafting process, he begins to plan the organization and arrangement of the provisions of his bill (Step 4). The bill may require that existing sections be amended or repealed or that new sections be enacted, or a combination thereof. When his analysis is completed he should know what to do and how to do it. An outline helps the student lay the groundwork for the actual writing. Outlining insures completeness and, in the case of a more complex bill, also aids the student in breaking the drafting job down into manageable units. The student makes an effort to arrange the provisions of his draft in a logical and orderly manner. He observes that a good idea, when presented in bill form, often goes down the legislative drain because of the draftsman's failure to organize and arrange the bill's provisions in the most understandable manner.

Drafting

Using his outline as a guide, the student's next step (Step 5) is to start the actual drafting of his bill. At first he concentrates on the substance and pays little attention to style. He has available a complete bill drafting manual (298 pages), prepared primarily for the use of the Legislative Council's staff, to aid him in matters of both substance and style. The manual makes suggestions, which are commonly made in drafting manuals but often overlooked, intended to help the draftsman write clearly and exactly. The student is admonished to be consistent in the use of words, the presumption being, he discovers, that the word or phrase used more than once in his bill, and in the body of statute law of which it becomes a part, has the same meaning throughout. Actual drafting demonstrates that brevity, without incompleteness, is a worthy goal.

Presumably the student has some familiarity with sentence structure; but he probably isn't aware, until he starts his drafting, that the parts of a complicated legislative sentence frequently fall nicely into place when he arranges the parts in this order: Case, condition, subject and action. The proper construction and arrangement of these parts increase the certainty that the sentence, to the extent and under the conditions desired, confers rights or imposes duties on persons whom the student intends to obligate or benefit, and no others. He further learns that statutes are considered as speaking continuously, not just as of the time of the drafting or enactment. He begins to use the present tense, to avoid the awkward tenses and to reserve "shall" for expressing command.

Through drafting, a student begins to appreciate the advantages of employing the active voice, he is exposed to preferences relating to number and gender, punctuation, capitalization and matters of style and he observes increased readability resulting from tabulation. The student begins to develop an awareness of the ambiguous, redundant and pretentious words and expressions he carelessly or proudly tosses into his drafts. Enumerations, to which the canons of construction *expressio unius, ejusdem generis* and *noscitur a sociis* may be applied, occur in his bill; and, if meaning is uncertain, he reconstructs the ambiguous sentence.

Bit by bit the bill takes shape—words, sentences, paragraphs, sections, the bill. New problems arise and solutions are sought. Additional policy questions are developed and, whenever possible, are referred to the requester for decision. As the drafting progresses, drafts are reviewed by the Legislative Counsel and the common defects and drafting problems encountered are discussed. At the same time, the pertinent rules of statutory construction are considered. Drafting technique, rather than the policy decisions or the substantive law involved, is emphasized in the discussion.

Revising and Checking Draft

The student is now ready for Step 6, the revising and checking of the draft for arrangement, consistency, coherence and clarity. He also, as a final check, refers to a checklist of some twenty-two questions to aid him in completing his draft. He must pause and systematically ask himself such questions as:

(1) Is the appropriate type of measure used; and will it accomplish what was requested—no more, no less?

(2) Are the constitutional limits on legislation observed?

(3) Are provisions of the bill properly arranged; will they create problems when compiled with existing statutes?

(4) Have definitions been used where desirable?

(5) Have pending matters been considered, and their disposition, and the problem of the effective date of the bill?

Preparing Letters of Transmittal and Memoranda

Upon completion of the drafting, the student prepares an appropriate letter of transmittal and memorandum to accompany the draft, citing, for example, statutes of other states used as the source of any new provisions. The letter of transmittal, memorandum and bill are given to the Legislative Counsel for final review. The bills are checked for completeness, accuracy, organization and failure to dispose properly of any questions on the checklist. Letters of transmittal and memoranda are also reviewed and criticized. The materials, with questions and comments, are returned to the students for further discussion. Thereafter, the materials are returned to the Legislative Counsel for his use and disposition.

Observing Legislative Operation and Organization

In addition to the actual drafting which the students do, they also discuss fully and observe to a more limited extent, the operation and organization of the Oregon legislature. Each student receives as reference material a copy of a seventy-page handbook, prepared by the Legislative Counsel's office for the Oregon legislator, which describes and diagrammatically presents legislative processes and procedures. To help the students understand how a legislative committee functions and how its recommendations are developed, an executive secretary of an interim legislative committee has explained to them the functions and operations of his committee and, at the same time, has presented the committee's request for the drafting of a bill. The students also attend an interim committee meeting at which they have an opportunity to see how a legislative committee operates and how lawyers function at these meetings, some as legislators and others representing their clients. Students are given an opportunity to ask committee members some questions about procedures as well as substantive points. Later, the oral presentations and the written materials submitted for the committee's consideration are discussed in class. The students also examine legislative records produced during the regular sessions; and the purposes, contents and uses of these records are explained and discussed, often in connection with some actual drafting project or some pending litigation.

Observing Application and Interpretation of Statutes

Interwoven with the bill drafting and the discussion and observation of legislative operation and organization is the discussion and observation of the application and interpretation of statutes. The first step in drafting, that is, to determine what the purpose of the bill is, brings the students directly and personally in contact with the practical problems some person is facing in the application of a statute. Does the statute apply? What does the statute mean? To complete his drafting assignment a student often contacts an agency head and persons claiming rights and powers conferred or exemptions from duties imposed. When a case presenting interesting questions of statutory interpretation is before the Oregon Supreme Court, students discuss the points raised in the briefs and, when schedules permit, witness the oral arguments in the case.

Drafting and observing the application and use of statutes lead one to the conclusion that statutes proliferate. Hydra-like, two seem to succeed every one repealed or modified to solve some problem of application. The students observe that improved draftsmanship would abate the undesirable development of our statute law and reduce unnecessary litigation and confusion. The desirable development and systematic improvement of Oregon's statute law is one of the official aims of the Legislative Counsel Committee and the Oregon State Bar. Through the efforts of the integrated Bar, and others, the Oregon legislature recently established a substantive law revision program to promote this aim.

Substantive Law Revision

Additional opportunities for student participation in the legislative process will be offered in connection with the substantive law revision program now being undertaken under the direction of the Legislative Counsel Committee. In the last 10 years, a number of ambiguities, conflicts and defects in the Oregon statutes have been noted by the Legislative Counsel's office through the statute editing process and the annotation of Supreme Court decisions, Attorney General's opinions and law review articles and as a result of suggestions from judges, practicing attorneys and state agencies. As a part of the substantive law revision program, these notes will be examined and proposed remedial legislation will be drafted for the approval of and introduction by the Legislative Counsel Committee. For a number of reasons, these drafting projects are better suited for student assignment than are those involving other sponsors.

Evaluation of Workshop

The legislative workshop at Willamette is not making skilled draftsmen of the second- and third-year law students who elect to take the one-semester, two-hour course. In the opinion of most of the students who have taken the course and of their instructor, the workshop does, however, improve a student's draftsmanship and promote his understanding and intelligent use of statutes. Too, the students generally find the learning-by-doing approach to be an interesting and stimulating departure from their regular classroom work.

Former students, now practicing, have found, so they report, that the technique used in bill drafting is equally helpful in drafting contracts, wills and pleadings, for example. Others report that they are "getting the news faster out of the books". Still others report that the course assisted them in working more effectively on state and local bar committees whose recommendations involved the drafting of proposed legislation. Several former students have done some lobbying.

The legislative workshop at Willamette provides its future lawyers with a realistic environment for a limited internship in two basic and indispensable skills—communicating in writing and understanding statute law, as distinguished from case law. The limitations of the present instructor cannot completely destroy the students' opportunity to capitalize on this ready-made laboratory.

Tax Notes

Prepared by Committee on Bulletin and Tax Notes, Section of Taxation, Kenneth H. Liles, Chairman; John M. Skilling, Jr., Vice Chairman.

Retroactivity of Consolidated Returns Rules Amendments

By E. Randolph Dale, New York, New York

The promulgation by the Treasury Department of T.D. 6412 September 10, 1959 (1959-42 IRB 11), containing new consolidated return rules made retroactive to all 1954 Code years, raises the question whether such rules can be validly made retroactive to years prior to those for which returns were due on and after the date of promulgation.

The amendment made to Section 1.1502-31(a)(23)(ii) of the Regulations[1] illustrates the problem. This amendment (among others) was made retroactive to taxable years beginning after December 31, 1953, and ending after August 16, 1954.

The regulations prior to the amendment provided for the deduction for charitable contributions in computing consolidated undistributed personal holding company income as follows:

> (ii) In lieu of the deduction provided by section 1.1502-31(a)(1)(i)(*c*), the consolidated charitable contribution deduction limited as provided in section 170(b)(1)(A) and (B) except that the 10 and 20 percent limitations therein shall be applied with respect to the consolidated adjusted gross income; and except that there shall not be included in the consolidated charitable contribution carry-over any amount which has been previously used in determination of consolidated undistributed personal holding company income or separate undistributed personal holding company income;

As amended by the Treasury decision the provision reads as follows:

> (ii) In lieu of the deduction provided by sub-paragraph (1)(i)(*c*) of this paragraph, the consolidated charitable contribution deduction computed without the application of section 170(b)(2) but limited as provided in section 170(b)(1)(A) and (B) (except that the 10-percent and 20-percent limitations therein shall be applied with respect to the consolidated adjusted gross income)...

Presumably the chief purpose of this amendment was to reflect the change made in the statute by Section 32(a) of the Technical Amendments Act of 1958 in which Congress eliminated the charitable contribution carryover as a deduction in computing undistributed personal holding company income under Section 545(b)(2). The Committee report points out that the purpose of the amendment related primarily to what seems to have been a technical inconsistency in the section in that, although the charitable contribution carryover is the excess of charitable contributions over 5 per cent of taxable income, the limitations applicable in computing undistributed personal holding company income are the 10 and 20 per cent limitations provided by Section 170(b)(1)(A) and (B). Thus it might be contended that the excess of contributions over the 5 per cent limitation might be allowed in the next two years as a carryover even though used for personal holding company purposes previously. See H. R. Report No. 775, 85th Congress, 1st Session, Calendar No. 262, 1958-3 CB 811, 884.

Rather than simply provide for an elimination of the double benefit, Congress chose to eliminate any charitable contribution carryover for purposes of computing undistributed personal holding company income retroactively for all 1954 Code years.

Consistent with this congressional action the Treasury decision eliminated any such carryover in computing consolidated undistributed personal holding company income for the same years. The question is thus presented whether in computing consolidated undistributed personal holding company income for taxable years 1954, 1955, 1956 and 1957[2] a consolidated charitable contribution carryover will be allowed (limited as provided before the amendment to an amount not previously used in such computation).[3]

It is difficult to see how the retroactive application of the rule eliminating the carryover (or any other retroactive rule) can be supported. If a consolidated return was filed for 1958 (pursuant to a maximum extension of time to September 15, 1959), it seems clear that by filing such a return the group consents to the application of the amended rule to 1958 and its tax liability for that year is controlled by such amended rule. Section 1501 and Section 1.1502-1(a). However, the rules do not appear to provide such a consent where a group filed consolidated returns for 1954, 1955, 1956 or 1957 but did not file a consolidated return for 1958. Further, even though a group filed consolidated returns for 1958 (pursuant to a maximum extension of time) or for a later year, its consent to the Regulations does not seem applicable to its consolidated returns for the years before 1958. The

1. Except where otherwise indicated all section numbers beginning with 1.1502 are sections of the Treasury Regulations; all others are sections of the Internal Revenue Code of 1954.

2. For convenience in discussion all references to taxable years are to calendar years only.

3. The provisions of Section 545(b)(2) are not applicable at any point in the computation under the regulations. The tax rates prescribed by Section 541 are applied to consolidated undistributed personal holding company income. Section 1.1502-30(a). Consolidated undistributed personal holding company income is defined by Section 1.1502-31(a)(23) as, *inter alia*, consolidated taxable income computed without regard to any charitable contribution deduction minus the sum of the deduction for charitable contributions provided by subdivision (ii). Subdivision (ii) provides for the deduction of the consolidated charitable contribution deduction. Section 1.1502-31(a)(7) defines the consolidated charitable contribution deduction as the aggregate amount of the deductions of the several affiliated corporations allowed under Section 170 (determined without regard to the 5 per cent limitation of Section 170(b)(2)) plus the consolidated charitable contribution carryovers. The consolidated charitable contribution carryovers are defined by paragraph (8) of Section 1.1502-31(a)(8) as, *inter alia*, the excess of the consolidated charitable contribution deductions for the two preceding taxable years over 5 per cent of the consolidated taxable income of such years.

following rules seem to make the above conclusions clear.

Section 1501 provides in part as follows:

> ...The making of a consolidated return shall be upon the consideration that all corporations which at any time during the taxable year have been members of the affiliated group consent to all the consolidated return regulations prescribed under Section 1502 prior to the last day prescribed by law for the making of such return. . .

Section 1.1502-1(a) of the Regulations reflects the statute as follows:

> . . . This privilege [of filing consolidated returns] is given, however, upon the condition that all corporations which have been members of the affiliated group at any time during the taxable year for which the return is made consent to the regulations under Section 1502 applicable to such taxable year and any amendments thereof duly prescribed prior to the last day prescribed by law for the filing of the return . . .

This is expanded and clarified in Section 1.1502-1(d) which reads as follows:

> (d) The tax liability of the members of the affiliated group for the taxable year involved will be determined in accordance with the provisions of the Regulations to which consent is given *and without regard to any changes of the rules therein prescribed made subsequent to the last day prescribed by law for the filing of the return for such year.* [Italics supplied.]

Considering first the case of an affiliated group which filed a consolidated return for 1957 (or other prior year) but did not file a consolidated return for 1958, the last possible date prescribed by law for filing the consolidated return of such group for 1957 is September 15, 1958. The amendments to the Regulations made by T.D. 6412 are clearly not among those consented to by the filing of the return for 1957 since they were not "prescribed prior to the last day prescribed by law for the filing of the return" (Section 1.1502-1(a)). Further, under Section 1.1502-1(d), *supra*, the tax liability of the group must be determined without regard to changes in the rules prescribed subsequent to September 15, 1958, *i.e.*, without regard to the amendments made by T.D. 6412, *supra*, since such amendments are "changes of the rules . . . made subsequent to the last day prescribed by law for the filing of the return for such year", *i.e.*, after September 15, 1958, even in the case of a maximum extension of time.

It seems clear therefore that regardless of the language in the Treasury decision with respect to the effective date of the amendments, the rules prescribed are not applicable in computing the 1957 (or prior year) tax of an affiliated group which did not file a consolidated return for the taxable year 1958.

The same rules seem to prohibit the application of the retroactive effective date of T.D. 6412 to 1957 or earlier even if a consolidated return for 1958 is filed pursuant to a maximum extension of time on September 15, 1959.[4] As Section 1.1502-1(a), *supra*, makes clear, by filing the consolidated return the affiliated group consents only "to the regulations under Section 1502 applicable to such taxable year and any amendments thereof duly prescribed prior to the last day prescribed by law for the filing of the return". Thus, the consent is to those regulations under Section 1502 applicable to 1958, the year for which the return is filed. There is no requirement that by filing the consolidated return the taxpayer consents to the regulations or amendments thereto under Section 1502 being made applicable to a *prior* taxable year. Further, Section 1.1502-1(d), as noted above, specifically sets forth the rule that the tax liability of the group shall be determined in accordance with the provisions of the regulations to which consent is given and "without regard to any changes of the rules therein prescribed made subsequent to the last day prescribed by law for the filing of the return for" 1957.

The rule of paragraph (d), *supra*, would likewise seem to eliminate the argument that in consenting to the amendments applicable to 1958 the taxpayer also consents to their retroactive effective date. Thus, the rules of paragraph (d) appear to make clear that the tax liability cannot be determined pursuant to rules prescribed subsequent to the last day prescribed by law for the filing of the return, in the instant case the return for the year 1957, the last possible due date for which is September 15, 1958.

It can be urged that the latest exercise of the Commissioner's rule-making authority is controlling over the exercise of such authority previously made in enacting Section 1.1502-1(d). Stated otherwise, the argument would be that the rule that tax liability will be computed without regard to any changes in the rules prescribed subsequent to the last day prescribed by law for the filing of the return for the year is still applicable, but only to the extent not modified by Treasury Decision 6412, *supra*. This argument seems sufficiently answered by the fact that (1) the Secretary did not purport to modify subsection (d), *supra*, and (2) the *statutory* requirement of consent is inconsistent with it. The latter argument is strengthened when it is considered that the rule of subsection (d), *supra*, is interpretative of the statutory Section 1501 rather than a legislative rule under Section 1502 and first appeared in Regulations 75 when the first consolidated return regulations were issued under Section 141 of the Revenue Act of 1928, the corresponding section to Section 1501-5. Substantially identical language has been included in all later revenue acts and in the 1939 Code. All later editions of the regulations have also contained language substantially similar to subsection (d), *supra*.

Superficially it might be contended that this result is inconsistent with the congressional intent where Congress has made a retroactive statutory change. However, it is difficult to find any clear indication of congressional intent as to the consolidated returns treatment of an amendment. In a great many cases amendments to the corporate income tax provisions of the Code do not require and are not followed by amendments to the Consolidated Return Regulations. In most cases, even where amendments to the regulations are required, they are only of the most minor type. For example statutory amendments frequently fit

4. The due date of such return is after the date of promulgation, September 10, 1959.

into the Consolidated Return Regulations automatically because the only modification needed to place them on a basis suitable for consolidated returns is the elimination of profit or loss on intercompany transactions.

A provision sufficient for this purpose has been in the regulations since they were first promulgated as Regulations 75. It therefore is difficult to urge that Congress intends any specific consolidated return treatment. Any modification is solely in the Secretary's discretion. Since Section 1501 restricts him from requiring the consent thereto retroactively, it must be held that Congress does not intend that the Secretary promulgate retroactive consolidated return rules.

In summary, unless the restriction against retroactive consent of Section 1501 can be deemed to be impliedly repealed, it seems clear that Congress does not desire retroactive consolidated return rule changes even in a case in which a retroactive change in the statute is made. Implied repeal is not usually accepted. A specific contrary provision to Section 1501 would seem necessary.

It seems clear therefore that the effective date of an amendment to the consolidated return regulations cannot be retroactive to a year the due date of the return for which is before the date amendments to the regulations are prescribed.

From a philosophical and practical point of view this result is not necessarily objectionable. Change of a rule by statute where the new rule operates more favorably to the Government is often made prospective only. In fact, the weight of the argument has always seemed to be against retroactive changes in tax statutes where the taxpayer will be injured. There is no compelling reason for a different view with regard to unfavorable changes in the Regulations.

Where a retroactive change in the regulation favors the taxpayer different considerations apply. Where the Secretary has directed the retroactive application of a more favorable rule it is difficult to see how the result can be anything but retroactive. The taxpayer will not oppose it and the Treasury staff will follow the retroactive effective date in accord with its literal wording.[5]

One essential step seems indicated by the present situation. The effective date of Treasury Decision 6412, *supra*, should be revoked. In the present posture the Revenue Service has no choice but to attempt to apply the rules retroactively. If the effective date language has any significance at all, it is that the taxpayer will be forced to litigate. The Treasury should promulgate a new Treasury decision providing for application of the rules only prospectively or for giving the taxpayer group an election to apply them retroactively.

5. The Treasury staff is usually bound by the literal terms of the Secretary's rules. So far as the author is aware, in recent years the Treasury has not intentionally taken a position contrary to its own regulations. See, however, *Recent Consolidated Return Cases—Can the Regulations Be Ignored?*, THE TAX EXECUTIVE, January, 1959, and JOURNAL OF TAXATION, November, 1959, by the author, for cases where the Treasury apparently inadvertently took positions directly contrary to at least the literal language of the Consolidated Return Regulations. During the thirties the Revenue Service frequently directed the taxation of all gains and the disallowance of all losses in reorganization cases but this practice has apparently been abandoned.

University of California Plans Legal Center on West Coast

Plans are now underway to establish the first legal center of the West on the Berkeley campus of the University of California. Named in honor of Chief Justice Earl Warren, a graduate of the University's Law School (Boalt Hall), it will provide space and facilities for year-round programs of adult education in legal problems and legal research as well as a residence hall for law students.

The center will serve as a meeting ground for members of the legal profession and the judiciary as well as others who wish to study and discuss means of improving the administration of justice and the formulation of our laws. For the past decade the Law School has been sponsoring conferences and institutes, but with the burgeoning school enrollment, there is no longer room for such meetings.

The center will comprise two buildings. In one, the conference hall, will be located a 500-seat auditorium, seven seminar rooms, a resources library, research rooms and offices. The other, a residence hall, will include dormitories for 125 students, dining and lounge facilities.

The University's Board of Regents has already earmarked $350,000 and land for the center, and a $1,000,000 fund raising campaign to complete financing has been launched by the Law School Association, under the chairmanship of Archibald M. Mull, Jr.

BAR ACTIVITIES

The State Bar of California has recently completed and dedicated two new buildings in San Francisco and Los Angeles for somewhat over a million dollars. They house all of the State Bar's offices and activities in the two principal California cities and are large enough to take care of growth.

The Los Angeles building, at 1230 West Third Street, a two-story, air-conditioned, reinforced concrete structure, contains about 10,000 square feet. It houses the offices of the Assistant Secretary of the State Bar for Los Angeles County, the Assistant Secretary of the Committee of Bar Examiners, the Secretary of the Committee on Unauthorized Practice, and many other staff members, investigators and secretarial assistants. There are a Board room and two large hearing rooms. The State Bar property includes parking facilities.

The Los Angeles building was dedicated April 4, in a ceremony attended by the members of the Supreme Court of California, the Mayor of Los Angeles, many other public officials and Bar Association representatives. Joseph A. Ball, of Long Beach, a former President, gave the principal address.

The San Francisco headquarters building at 601 McAllister Street, has two-stories and a basement, and is an air-conditioned, reinforced concrete structure. It contains 18,000 square feet. It houses the offices for all the officers and staff except those located in Los Angeles: the office of the Secretary of the State Bar, the Secretary of the Committee of Bar Examiners, the Director of Public Relations, the Counsel for the State Bar, the cashier, and many staff members, investigators and clerical assistants. There is ample parking space at the rear of the building. The building contains a Board room and one large hearing room.

The San Francisco building was dedicated May 26 at a public luncheon at the Fairmont Hotel. Besides the members of the Supreme Court, representatives and members of fourteen Bay Area bar associations attended the dedication. These associations joined with the Bar Association of San Francisco to co-sponsor the event.

Paul S. Jordan, President of the Bar Association of San Francisco, presided, and Mr. Justice Roger J. Traynor, of the Supreme Court of California, gave the main address. Burnham Enersen, of San Francisco, President of the State Bar, responded. Afterwards many went to the building to witness the placing of a tape recording of the proceedings and other memorabilia in the dedicatory plaque in the building lobby.

Both building projects, including land, construction contracts, architects' fees, furnishings and incidental expenses amounted to slightly more than $1,000,000.

The land was bought with State Bar reserve funds. All other costs will come out of an extra $5.00 per year State Bar dues which the Legislature approved in 1959 for a ten-year period. To finance the construction the State Bar borrowed $700,000, repayable in installments over the period.

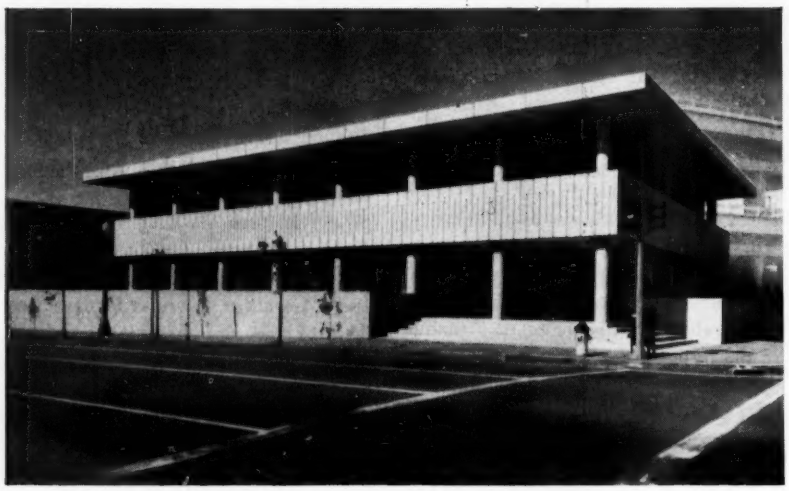
Taxing authorities have declared both buildings to be exempt from property taxes. The maintenance and operation costs are expected to be only a fraction of the rent which the State Bar would otherwise have to pay for comparable space leased in Los Angeles and San Francisco.

There is enough land to permit additions to each building if the needs of the State Bar should ever outgrow the existing structures.

These two buildings are the culmination of several years of planning and work by many persons. The program for housing the State Bar in its own properties had its origin in a study made some years ago by a State Bar Committee under the Chairmanship of Judge Gerald S. Levin, a former President of the Bar Association of San Francisco and now a Judge of the Superior Court in San Francisco. This committee found that the State Bar would benefit financially and in many

First Meeting of the Board of Governors of the State Bar of California in Its New San Francisco Headquarters.

California State Bar Headquarters, Los Angeles



California State Bar Headquarters, San Francisco

other ways by acquiring buildings of its own. The Board of Governors approved this recommendation and set about putting it into effect. The 1958 Special Session of the Legislature enacted, and Governor Knight approved, a proposal recommended by the Board of Governors for a temporary $5.00 per year in addition to the State Bar dues for active members which went into effect in 1959 and may continue through 1968. As soon as financing was thus assured the actual building plans were pursued rapidly.

The following are the names of all who have served on these committees:

Edward Bronson, Webster V. Clark, Burnham Enersen, James Farraher, Howard J. Finn, John J. Goldberg, Farnham P. Griffiths (now deceased), Gerald S. Levin, F. M. McAuliffe (now deceased) and Hart H. Spiegel, all of San Francisco; Gerald F. Bridges, Grant B. Cooper, Walter R. Ely, Stevens Fargo, John S. Frazer, Joseph Gorman, Paul R. Hutchinson, Dana Latham, Marcus Mattson, Frank S. Balthis, James C. Sheppard, J. E. Simpson, Graham L. Sterling, Jr., Edwin W. Taylor and George Bouchard, of Los Angeles; James B. Boyle, Pasadena; Robert Collins, Richmond; Frank J. Creede, Carmel; Gerald H. Hagar, Samuel H. Wagener and Edwin A. Heafey, of Oakland; Albert J. Ruffo, San Jose; Joseph A. Ball, Long Beach; and Marlin W. Haley, Hayward.

The Akron Bar Association (Ohio) announces that nominations are now being received for the Naturalized American Award for 1960. The award, believed to be the first of its kind in this country, was established by the Akron Bar Association in 1959 for the purpose of recognizing the many outstanding contributions made by naturalized Americans in the community.

All naturalized Americans living or working in Summit County are eligible for nomination. Selection of the recipient will be made by a committee and will be based upon the distinction which the individual has attained in his particular field or profession and the contribution made to the community or public welfare. Winner of the award in 1959 was Dr. Karl Arnstein, internationally known designer of lighter-than-air craft.

Presentation will be made at a public dinner to be held on September 17, American Citizenship Day.

Will S. Mitchell was named President of the Arkansas Bar Association at its sixty-second annual meeting in Hot Springs on June 10, succeeding Willis B. Smith.

Three new awards—to the outstanding lawyer, the lawyer-citizen, and the outstanding local bar association—were presented for the first time. The presentations were made at the annual banquet, jointly by the Association and the Arkansas Bar Foundation.

Joe C. Barrett, of Jonesboro, well known in American Bar work, received the outstanding lawyer award; Adrian Williamson, of Monticello, the lawyer-citizen award; and the Pulaski County Bar Association, the outstanding local bar association award, primarily for its leadership to the community in a period of unusual disturbance.

Heartsill Ragon, of Fort Smith, was elected Vice President, and Phillip Carroll, of Little Rock, was re-elected Secretary-Treasurer.

The annual tax institute featured Paul P. Lipton, of Milwaukee, and Louis Bender, of New York City, on "The Taxpayer Under Investigation"

Will S. Mitchell

T. Harding, Jr.

and "The Income Tax and the Fourth and Fifth Amendments", respectively, with Leonard L. Scott, Chairman of the Association's Committee on Taxation, Trusts and Estate Planning, acting as moderator of the panel.

Gibson Gayle, of Houston, Texas, Chairman of the Junior Bar Conference of the American Bar Association, spoke to the Junior Bar Section on the defense of unpopular causes.

Russell L. Dearmont, of St. Louis, President of the Missouri Pacific Lines, spoke to a luncheon group on transportation problems.

John C. Satterfield, of Yazoo City, Mississippi, President-Elect-Nominee of the American Bar Association, spoke on "Is American Democracy Fading Away?"

Mr. Smith delivered the president's annual address, his topic being "The Responsibility of Lawyers" and Mrs. Maurine Howard Abernathy, president of the National Association of Women Lawyers, addressed a luncheon meeting on "Not the Letter—the Spirit of the Law".

Louis L. Ramsay, Jr., a director of the Arkansas Bar Foundation, reported the purchase of the Rose Building at 314 West Markham Street, Little Rock, to be used as a bar headquarters when the present occupants move into their new building; the Awards to the *Arkansas Law Review* in the form of grants for legal articles; the scholarships to the University of Arkansas School of Law; and the projects in cooperation with the Arkansas Judicial Council.

Edward L. Wright spoke to the Conference of Local Bar Associations on "What the American Bar Association Can Mean to a Local Bar Association".

Ruth Joyce Hens

Chase, Ltd.

The Women's Bar Association of the District of Columbia has elected Ruth Joyce Hens President for 1960-1961 at the Association's 43d annual meeting held in Washington, D. C., on May 17. Miss Hens, a member of the American Bar Association, and past Associate Editor of the Junior Bar Conference's *Young Lawyer*, is engaged in practice in the District of Columbia and Arlington, Virginia.

Under auspices of the Bar Association of the District of Columbia, of which she is a member, and in her capacity as Chairman of the Public Information Committee of that Association, Miss Hens also produces the weekly radio forum discussion program, "District Round Table", heard on radio station WWDC each Sunday evening. She received her LL.B. degree from The George Washington University Law School in 1951.

Carroll B. Callahan

More than 600 lawyers attended the annual meeting of the State Bar of Wisconsin held at Lake Delton in the Wisconsin Dells in south-central Wisconsin, June 16 and 17.

The entire program of the meeting was built around the sessions of the several sections of the State Bar which meet simultaneously. These include the Sections on Family Law, Labor Law, Real Property, Corporation and Business Law, Military Law, Insurance, Taxation, House Counsel and the newly organized Patent, Trademark and Copyright Section. The Board of Governors at this meeting established a new Section on Criminal Law.

Carroll B. Callahan, of Columbus, took office as President at the conclusion of the meeting, succeeding Herbert L. Terwilliger, of Wausau. New officers, elected by a mail ballot of all active members during May, are John Whitney, of Green Bay, President-Elect; George Blake, of Madison, Secretary; and Fred D. Hartley, of Kenosha, Treasurer.

An extensive program for 1960-1961 has been announced by President Callahan, including the issuance of a lawyers' deskbook, an expanded program of post-graduate activities, an improved legislative reporting system and a step-up in the tempo of section and committee activities.

Francis S. Bensel

Wagner-International Photos, Inc.

In his final report as President of the New York County Lawyers' Association, at the Association's annual meeting, May 19, Judge Arthur H. Schwartz announced that the headquarters building, at 14 Vesey Street, opposite St. Paul's chapel, has been selected for inclusion in the Index of Architecturally Historic Structures in New York City and that a memorial plaque signifying the architectural and historic values of the building will be affixed to the façade. The Cass Gilbert building of heavy limestone structure and a Georgian façade presents certain aspects of the more serious type of buildings in Lincoln's Inn Fields, London, and some of the ancient Paris buildings. The architectural design of the second floor auditorium is reminiscent of the interior of Independence Hall, Philadelphia. The building was dedicated in 1930. The Association has a membership of almost 10,000.

The new officers, unopposed for elec-

tion, are: Francis S. Bensel, President; Edward H. Green, Eugene A. Sherpick and Leo Gottlieb, Vice Presidents; Thomas Keogh, Secretary, and Miss Ruth Lewinson, Treasurer. Miss Lewinson, who has just completed her twenty-fifth year in the office, said the receipts had grown in those years from $138,000 a year to $240,000.

Richard W. Galiher

H. T. Garrett

The Bar Association of the District of Columbia has elected Richard W. Galiher as its President for 1960-1961. His election in the Association's mail ballot was reported at the annual meeting in June. Mr. Galiher succeeds Frederick A. Ballard.

Other officers elected were: Donald H. Dalton, First Vice President; Richard H. Mayfield, Second Vice President; David C. Bastian, Secretary; and Charles Effinger Smoot, Treasurer. Four were elected to the Board of Directors: J. Joseph Barse, William T. Hannan, Thomas B. Heffelfinger, and Robert M. Gray. Also named to the Board in Section elections were: Walter F. Sheble, Junior Bar Section; Geoffrey Creyke, Jr., Administrative Law Section; and Francis C. Browne, Patent, Trademark and Copyright Law Section.

Elected as delegates to the American Bar Association's House of Delegates were: W. Cameron Burton, Thomas M. Raysor, David G. Bress, Charles B. Murray and James C. Wilkes, Sr.

Three others were elected as Trustees of the Bar Association Research Foundation: Al Philip Kane, G. Bowdoin Craighill, Jr., and Ross O'Donoghue.

H. C. Eberhart

The 77th annual meeting of the Georgia Bar Association was held in Savannah on May 25, 26 and 27. Homer C. Eberhardt, of Valdosta, was elected President; Marcus B. Calhoun, of Thomasville, Vice President; Maurice C. Thomas, of Macon, Secretary; and J. Wilson Parker, of Atlanta, Treasurer.

The principal address at the annual banquet was delivered by Sam Rayburn, Speaker of the House of Representatives. Other speakers at sessions of the meeting were Joseph D. Quillian, Associate Justice of the Supreme Court of Georgia; Frank A. Hooper, United States Judge, Northern District of Georgia; and Mrs. Joline Bateman Williams, of Mercer University.

Samuel J. Stallings

Samuel J. Stallings, of Louisville, succeeded Ben B. Fowler, of Frankfurt, as President of the Kentucky State Bar Association at its annual meeting held in Louisville on April 6-7.

A panel consisting of Lieutenant Governor Wilson W. Wyatt, Chief Justice Maurice C. Montgomery, of the Court of Appeals of Kentucky, John A. Fulton, of Louisville, and Rufus Lisle, of Lexington, with Ed P. Jackson, of Louisville, serving as Chairman, discussed revision of the Judicial Article of the Constitution.

John C. Satterfield, of Yazoo City, Mississippi, addressed the General Assembly luncheon and also participated in a panel discussion of "How To Be a Lawyer Without Being Broke". The panel reviewed the economics of law practice and many helpful suggestions were offered.

Gibson Gayle, Jr., of Houston, Texas, Chairman of the Junior Bar Conference of the American Bar Association, spoke at a luncheon meeting.

The guest speaker at the Annual Banquet was Roger D. Branigin, of Lafayette, Indiana.

Harold Horvitz

The Massachusetts Bar Association held its Fifty-First Annual Meeting on June 11, at Plymouth.

Executive Director Albert West reported on headquarters changes during the past year and described the inauguration of the *Newsletter* which, beginning the fall of 1960, will be published monthly.

Harold Horvitz, of Cambridge, was elected President of the Association. Also elected were Vice Presidents Sumner H. Babcock, James H. Fitzgerald, Anna E. Hirsch, Laurence H. Lougee and Henry R. Mayo, Jr. Alan J. Dimond, of Brookline, was elevated to the office of Secretary; Milton J. Donovan, of Springfield, was elected Treasurer.

Frank W. Grinnell, of Boston, the retiring Secretary, was named Secretary Emeritus.

After a summary of President Horvitz's report and a brief discussion about the location of next year's Annual Meeting, the meeting adjourned.

Activities of Sections

SECTION OF CRIMINAL LAW

The Section of Criminal Law's assignment given last February by the Board of Governors to study the problem of delays in the imposition of sentences in capital cases has been withdrawn and the matter referred to the American Bar Foundation. This action was taken by the Board of Governors in May, after a request for operating funds for the study was turned down by the Foundation and permission to seek funds independently was refused. The study will now be incorporated in the Foundation's Survey of the Administration of Criminal Justice, and the Section will, of course, co-operate with the Foundation to the extent desired by the latter.

Section headquarters for the Washington meeting will be the Congressional Room of the Willard Hotel, and plans for four sessions are well advanced. The Section's business meeting will be held at 9:30 A.M. on the first day, Monday, August 29, at which time new officers will be elected, committee reports received, and the work of the Section generally discussed. Chairman of the Nominating Committee is Judge James J. Robinson, who will be at 1026 16th Street, N.W., after July 25. Appointed to serve with him are Judge Orman W. Ketcham, Juvenile Court Building, Washington 25, D. C., and William B. McKesson, City Hall, Los Angeles 12, California.

Following the business meeting on Monday, August 29, the Metropolitan Police Department of the District of Columbia will put on a dress role and a discussion and demonstration of metropolitan police procedures. On Tuesday, August 30, at 10:00 A.M., a panel discussion of "Crime Portrayal in Public Media" is scheduled; on Tuesday at 2:00 P.M., the subject will be "Alcoholism and Alcohol-Induced Offenses"; and on Wednesday, August 31, at 2:00 P.M., a panel will discuss "Criminal Responsibility in International Law".

Several Section members have expressed interest in launching a study of grand jury procedures and the role of the grand jury in criminal law administration. Appointment of a new committee to deal with this subject will be considered during the August meetings.

SECTION OF CORPORATION, BANKING AND BUSINESS LAW

All lawyers in the broad field of business law will be interested in the July issue of *The Business Lawyer*, just published by the Section of Corporation, Banking and Business Law under the able guidance of its Editor, Samuel B. Stewart, of San Francisco, and containing a wide variety of practical articles on problems of current interest to the busy lawyer and reports on developments in the law.

A notable contribution to the literature on the subject is an article by Charles W. Steadman, of Cleveland, on "Increasing Management's Real Income Through Deferral and Stock Options", and certain to figure prominently in any further discussion of the merits of the proposed California Corporate Securities Law are the views expressed by Robert H. Edwards in his article on "California Measures the Uniform Securities Act Against Its Corporate Securities Law".

Typical of the variety of authoritative comment are the articles by Robert B. Ely III on "Escheats: Perils and Precautions"; by Leonard D. Adkins on "The New Haven Preferred Stock Cases"; by Kenneth M. Johnson on "The Floating Lien and the Federal Tax Lien"; by Devereaux F. McClatchey on "Commercial Banks Need Not Be Crowded Out of the Market for Savings Accounts"; and by H. Orvel Sebring on "Log Jam on the Potomac —the Current Delay Problem of the SEC". Typical of the articles on developments in the law are reports by Carroll G. Moore on "Developments in Factoring, Inventory Liens and Accounts Receivable Financing", and by Sydney Krause on "Developments in Bankruptcy Law".

Members of the American Bar Association are reminded that they may receive *The Business Lawyer* regularly without further charge by joining the Section. A letter of intention to the Section's Executive Secretary, Farrington B. Kinne, American Bar Center, Chicago 37, with a check of $5 for annual dues payable to the American Bar Association will enroll you as a member of the Section.

Annual subscriptions to *The Business Lawyer* have now been made available at $6 to any company, firm or institution and to any person who is not eligible to become a member of the American Bar Association. A number of Section members have utilized this opportunity to secure an annual subscription for their clients and business associates or organizations.

All American Bar Association members attending the Washington meeting will receive upon registration, to the extent still available at that time, a separate folder giving the details of the Section's program. Their attention is invited to the general sessions on Monday and Tuesday, August 29 and 30, for their interesting and informative programs, and particularly to the first Annual Dinner Dance of the Section which will be held Monday evening on the Terrace Garden of The Shoreham. Tickets for this notable event may be purchased either at the American Bar Association registration desk or from the Section's Executive Secretary and staff in the lobby of The Shoreham.

SECTION OF PATENT, TRADEMARK AND COPYRIGHT LAW

The Section of Patent, Trademark and Copyright Law, as part of the interesting program which it has planned for the members of the American Bar Association and our guests from Britain during the forthcoming meeting in

August, has co-operated with the Patent Office and the Department of Commerce in arrangements for an exhibit depicting "Progress in Industry Through Patents" which will be formally opened in the lobby of the Department of Commerce Building (14th Street, between Constitution Avenue and E Street, N.W.) on Friday, August 26, at 2:00 P.M. The opening ceremony will include very brief addresses by Frederick H. Mueller, Secretary of Commerce, Robert C. Watson, Commissioner of Patents, and John T. Love, Chairman of the Section of Patent, Trademark and Copyright Law.

Sixteen prominent manufacturers, whose products are internationally known and whose fields embrace chemistry, electronics and machinery, as well as allied technical arts, will show examples of their products and how patents have helped them in their development and the bringing of these products to the public. Everyone who is in attendance at the meeting in August is cordially invited to attend without charge this exhibit which will be open continuously throughout the meeting.

To complete the international flavor of the Patent Section program, Richard Spencer, internationally known patent lawyer and former First Assistant Commissioner of Patents, will address the Patent Section at its luncheon on Wednesday, August 31, on the subject of "Patents and the European Common Market". Tickets for this luncheon are available at headquarters.

SECTION OF LABOR RELATIONS LAW

On May 25, 1960, the Section participated in the Pacific Northwest Regional Meeting at Portland, Oregon, under the general chairmanship of James C. Dezendorf, of Portland. Professor Paul R. Hays, of the Columbia Law School, New York, New York, Secretary of the Section, read a paper "Federal versus State Jurisdiction". George E. Bodle, Los Angeles, California, Co-chairman of the Section Committee on Legal Representation, discussed "Secondary Boycotts" and Marion B. Plant, San Francisco, California, member of the Council of the Section, spoke on "Organizational and Recognitional Picketing". These topics were particularly timely in view of the enactment last year of the Labor Reform Act and were enthusiastically received by those attending the program. In fact, it was suggested that because of their scholarly quality resulting from the time and effort put into these papers by the participants, they should be published for the benefit of lawyers practicing in the field of labor relations.

A discussion period followed the talks. Edwin Pearce, of Atlanta, Georgia, Vice Chairman of the Section, presided and handled the meeting in a manner most befitting the occasion. In addition to his participation in the Section's presentation during the question-and-answer period, he also provided the well-attended meeting with a history of the Section and delineated its aims and purposes.

At this year's Annual Meeting in Washington, D. C., the Council will meet August 27 and 28, with the Section meetings scheduled for August 29 and 30 at the Sheraton-Park Hotel. An excellent program has been arranged, and a particularly large turnout is anticipated. Section chairmen of the Standing Committees of the Section have been busy preparing their reports to be presented at the Annual Meeting. It is expected that the reports this year will be of particular interest to the lawyers present. At the Midyear Meeting of the Council held in Chicago, it was voted that despite the tight schedule at this year's Annual Meeting, each Committee Chairman would be permitted twenty minutes for his report.

It was with much pleasure that William N. Bonner, General Chairman of the Southwest Regional Meeting, was notified of the intention of the Section to participate in the proceedings to be held at Houston, Texas, November 9-12, 1960. The tentative program, which has been submitted, is a panel discussion on the topic "Picketing and Boycotts in the Light of the New Federal Labor Law". Panelists will be Frank A. Constangy, of Atlanta, Georgia, member of the Council of the Section, John H. Morse, of New York, New York, member of the Council of the Section, Edwin Pearce, of Atlanta, Georgia, Vice Chairman of the Section, and Thurlow B. Smoot, of Cleveland, Ohio, member of the Council of the Section. John W. Morgan, of Boston, Massachusetts, Chairman of the Section, will moderate the discussion.

THE MAY, 1960, issue of the *Journal of the Missouri Bar* reports a story about a law office in Springfield that was being redecorated and modernized. One member of the Bar there went around for a week complaining of a backache before he learned that he had been sitting in a modern waste basket rather than in his new chair.

OUR YOUNGER LAWYERS

Kenneth J. Burns, Jr., Chicago, Illinois, Secretary, Junior Bar Conference;
Elizabeth Elward, Washington, D.C., Editor;
Charlotte P. Murphy, Washington, D.C., Associate Editor

Review of the Conference Year

The 1959-60 Junior Bar Conference year under the leadership of Chairman Gibson Gayle, Jr., of Houston, Texas, has been a year of increased efforts by the Conference to serve young lawyers as their national organization. In the following paragraphs, highlights of the year's accomplishments are outlined. The Conference year ends at the 1960 Annual Meeting to be held in Washington, D. C., August 25 through 30.

Many Local Organizations Affiliate

The Affiliation Committee, under the chairmanship of William R. Cogar, of Richmond, Virginia, conducted an extensive and successful campaign. Local junior bar organizations are becoming increasingly aware of the importance of aligning with the Conference since affiliation gives the young lawyers across the country more strength through organization and unity.

The following state and local junior bar units were affiliated with the Conference at the 1960 midyear meeting of the Executive Council: Junior Section of the New Jersey State Bar Association; Junior Bar Section of the Nebraska State Bar Association; the Charleston, South Carolina, Lawyers Club; and the Junior Bar Section of the Macomb County Bar Association (Michigan).

In July, by vote of the Executive Council in response to a resolution proposed by J.B.C. Secretary, Kenneth J. Burns, Jr., of Chicago, the following junior bar organizations were affiliated: Younger Lawyers of the Federal Bar Association; the Barristers Club of the Sacramento County Bar Association; the Junior Bar Section of the Cambria County Bar Association (Pennsylvania), and the Junior Bar Association of Berks County, Pennsylvania.

Ninety-seven junior bar units are currently affiliated with the Junior Bar Conference.

Other organizations petitioning for affiliation are the Young Lawyers' Committee of the New York County Lawyers' Association, the Barristers Club of Springfield, Ohio, Junior Bar Section (Region 2) of the State Bar of Michigan, Junior Bar Committee of the Bar Association of Nassau County, New York, and the Younger Members Section of the Winnebago County Bar Association (Illinois). Action will be taken upon these petitions at the 1960 Annual Meeting.

Projects Bulletins Report on Continuing Legal Education and Speakers' Bureaus

Fulfilling its responsibility to keep affiliated organizations informed about successful programs, the Projects Committee developed a new type of bulletin outlining in detail ways to conduct various activities. Highlighted this spring have been programs on continuing legal education, speakers' bureaus, law for laymen, high school panels, and foundations of freedom programs. George T. Roumell, Jr., of Detroit, and K. Hayes Callicutt, of Jackson, Mississippi, have been responsible for the bulletins. The bulletins are sent to the officers of all affiliated units.

Continuing legal education has been an important phase of Chairman Gayle's program this past year. A few of the affiliated organizations that have conducted outstanding programs are the Junior Bar Section of the Florida Bar, the Junior Bar Section of the State Bar of Michigan, the Junior Bar Section of the Mississippi State Bar Association, the Younger Members Committee of the Chicago Bar Association and the Junior Barristers of the Los Angeles Bar Association. Programs have also been very successful in Connecticut, Washington, D. C., and Columbus, Ohio.

Unauthorized Practice Lectures Held at Law Schools

The program of the Unauthorized Practice of Law Committee has been to inaugurate lectures in each law school on the subject of unauthorized practice with particular emphasis on reaching graduating seniors. Lectures were presented this year at West Virginia University College of Law, and at Georgetown Law Center and Catholic University, both located in Washington, D. C. The Law School of Montana State University has conducted such a program for the last four years and the University of Washington Law School has also conducted such a program for several years.

Members of the Conference committee are arranging unauthorized practice lectures in such additional schools as Indiana, Arkansas, Florida, Michigan, Idaho, Oklahoma, Virginia, Massachusetts and the University of Richmond. James R. Sweeney, Jr., of Chicago, is committee chairman. He is assisted by twelve vice chairmen and sixty-seven committee members.

Young Lawyer in Government Is Served

" 'Do your present duties provide opportunity for the development and exercise of initiative and personal responsibility?' 'Have you seen or experienced any pressure imposed upon attorneys for opinions desired by non-attorney supervisors (or seniors)?' 'Does your work generally give you a feeling of professional satisfaction?' " These are some of the questions which have been asked government lawyers

under age thirty-six through the Junior Bar Conference's *Survey of Attitudes of Young Attorneys in Government and Armed Services.* Early this year, the Conference's committee on the status of the young lawyer in government conducted a poll of over 2,000 lawyers in government to attempt to determine ways in which the standing of young lawyers in government can be improved. There was a large response to the extensive questionnaire and a report of the findings will be published later in the year. Robert Becker, of Washington, D. C., Vice Chairman of the Government Lawyer Committee, was responsible for the survey.

Another ambitious and successful program organized by this committee was the placement information service for young lawyers seeking posts in the Federal Government. Information on current government vacancies for lawyers is provided upon written request to Conference headquarters. This service, under the direction of George M. Coburn, of Washington, D. C., has provided placement information to over three hundred young lawyers. Edwin S. Rockefeller is Chairman of the Government Lawyer Committee.

Placement Information Program Broadens

Stemming from the success of the federal job information service and from the co-operation of the American Law Student Association, the Conference and the Law Student Association will sponsor jointly a lawyer placement information service at this year's Annual Meeting in Washington. This is an additional step taken by these two groups to serve their members in placement.

This service will enable lawyers and senior law students attending the Annual Meeting to review the numerous positions open for lawyers in law firms, industry and government agencies, and to arrange for interviews while in Washington. Parties wishing to use this Service, however, need not be present at the Annual Meeting. Job description forms and résumé forms of those not attending may be placed on file for review by interested parties.

Employers seeking lawyers may write to the J.B.C.-A.L.S.A. Lawyer Placement Information Service, American Bar Center, Chicago 37, and obtain forms on which to describe their available positions. Lawyers who are members of the American Bar Association and senior law students may register with the Service. These forms must be returned to the Bar Center by August 22. They will be placed on file for review by interested parties in the Silver Room, The Statler-Hilton, in Washington, D. C. The Service will be open from 12:00 noon on August 28, and will operate from 9:00 A.M. to 5:00 P.M. through September 1.

The Service will be staffed with professional placement personnel who will answer questions and assist prospective employers and job applicants.

Conference officials are hopeful that a successful annual meeting placement program will clear the way for a permanent nation-wide lawyer placement information service to be located at the American Bar Center.

Conference Membership Continues To Grow

Membership in the Junior Bar Conference has passed the 25,000 mark and continues to grow. All American Bar Association members under the age of 36 are Conference members. The Conference co-hosts new admittee luncheons in Iowa, Texas, California and Utah where young lawyers are doing outstanding work in gaining new members for the American Bar Association. In Iowa, during the last five years every one of the approximately 750 lawyers admitted to the practice of law has joined the American Bar Association. This 100 per cent record of American Bar membership for new admittees is a result of Iowa's "model" admissions ceremony. At each ceremony during the five years, S. David Peshkin, of Des Moines, Chairman of the Association's Standing Committee on Membership and Junior Bar Conference director, has spoken to the admittees about the importance of bar association affiliation. He personally endorses the applications.

Paul L. Jaffe, of Philadelphia, Pennsylvania, is Conference membership chairman.

Helpful Articles Featured in "The Young Lawyer"

The Young Lawyer, the news publication circulated to all Conference members, has been increased from three to four issues yearly during the past year. Emphasis is given to short, practical articles which the young lawyer can read quickly and from which he can obtain substantial benefit.

The February issue featured tips on planning a deposition by Josh H. Groce, of San Antonio. Demand has been so great for additional copies containing this checklist that reprints have been made. A checklist for trial lawyers entitled "These Are Cardinal Principles of Cross-Examination" by Irving Goldstein, of Chicago, appeared in the May issue.

The August issue of *The Young Lawyer* features articles on the basic points to remember in drafting wills and preparing a personal injury case.

As interest in this publication increases, it is hoped that the number of issues may be increased as another service to Conference members. Charles O. Brizius, of Chicago, is the editor.

Conference Helps Other Sections and Committees

This has been a banner year for the Conference in its relationship with other Sections and Committees of the American Bar Association. Two Conference officers, Chairman Gibson Gayle, Jr., of Houston, and Secretary Kenneth J. Burns, Jr., of Chicago, participated in a demonstration of modern theories of procedure sponsored jointly by the American Bar Association Sections of Judicial Administration and Insurance, Negligence and Compensation Law at the Pacific Northwest Regional Meeting held in Portland, Oregon, in May.

A new policy of providing copy space for other sections in *The Young Lawyer* has been adopted this year. Other sections having specific opportunities for young lawyers may announce such opportunities in this publication. The Section of Real Property, Probate and Trust Law has reported that over fifty young lawyers have offered to work on that Section's committees as a result of its announcement in *The Young Lawyer.*

The Conference's committee on co-operation with American Bar Association Sections and the American Law Student Association conducted a survey of the "official family" of the Conference for purposes of interesting more members in the activities of other Sections.

At the 1960 Midyear Meeting of the American Bar Association, the Conference sponsored a reception for chairmen of other Sections and at the Portland Regional Meeting was host at a reception for all in attendance. R. Harvey Chappell, Jr., of Richmond, Virginia, and John C. McNulty, of Minneapolis, are Co-Chairmen of the Conference's Committee on Co-operation with American Bar Association Sections and the American Law Student Association.

Two American Bar Association committees are being assisted greatly by their counterpart committees of the Junior Bar Conference. A new Conference committee, the Clients' Security Fund Committee, has been primarily concerned with organizing and defining the scope of its activity. This committee is working closely with the Association's Committee. A prime function of this Conference committee has been to work closely with that of the Association in encouraging the establishment of clients' security funds. Stanley H. Siegel, of Lewistown, Pennsylvania, and Richard F. Alden, of Los Angeles, are Co-Chairmen of the Conference's Clients' Security Fund Committee and are responsible for its organization.

The World Peace Through Law Committee of the Conference has established an extensive organization throughout the country to assist the Association's World Peace Committee. The Conference committee is responsible for the design and publication of a leaflet entitled "War or Law", which is distributed by the American Bar Association. Lewis A. Dysart, of Kansas City, Conference committee chairman, is working closely with Charles S. Rhyne, of Washington, D. C., chairman of the Association's Special Committee on World Peace Through Law.

Conference Assists in Campaign To Pass Smathers Bill (H.R. 10)

Primary efforts of the Conference legislative committee have been to assist in the passage of the Smathers-Morton-Keogh-Simpson Bill (H.R. 10), a bill which would amend the tax laws to enable self-employed persons such as lawyers to establish individual retirement programs on a deferred tax basis. The bill would extend to the self-employed the tax benefits which have long been available to corporate employees.

The Conference committee worked with the Association's Washington office in instigating a substantial campaign directed at the members of the Senate Finance Committee, particularly those who were resisting the legislation. Substantial overtures were made to these people by many other organizations.

The chances of the bill appear excellent. It is hoped that the Conference's contribution has assisted in helping to make the campaign a success. Chairman of the Conference Legislative Committee is Edwin R. Schneider, of Washington, D. C.

Conference Members Participate in Regional Meetings

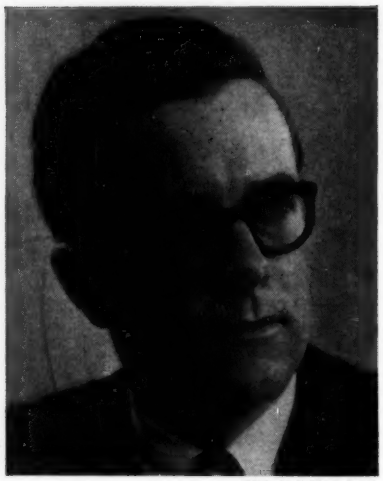
In addition to co-operating with the Sections of Judicial Administration and Insurance, Negligence and Compensation Law at the Pacific Northwest Regional Meeting, as previously stated, the Conference sponsored its own program at that meeting. Authorities from Seattle and Portland discussed the basic problems in probate practice and title insurance. Responsible for this program were Robert A. Stewart, of Seattle, and Robert S. Mucklestone, Executive Council member from the Ninth District.

In November, 1959, another successful Conference program was given as part of the Southern Regional meeting in Memphis under the supervision of Richard H. Allen, of Memphis, Executive Council Representative from the Sixth District.

Outstanding Annual Meeting Will Conclude Successful Year

The Annual Meeting for the nation's young lawyers will be held in the nation's capital from August 25 to 30. It will feature top-ranking members of each governmental branch, the judiciary, legislative and executive. Tom C. Clark, Associate Justice of the United States Supreme Court, Senator Kenneth B. Keating, of New York, and Assistant Attorney General Robert C. Bicks, Chief of the Justice Department's Antitrust Division, will address the meeting.

Also included on the program are two outstanding young lawyers from Canada and England: George W. Edmonds, President of the Junior Bar Section of The Canadian Bar Association, of Toronto, Ontario, and Richard Edward Geoffrey Howe, of London,



Elliott & Fry, Ltd.

Richard Edward Geoffrey Howe

one of England's outstanding young barristers.

Two panel discussions will be presented. The first, arranged in conjunction with the Section of Corporation, Banking and Business Law, is entitled "Where To Look for Money—A Financial Clinic for Lawyers". The second discussion will concern the problems of the legal profession in an age of big government.

Receptions will be held in the Senate Caucus Room of the Senate Office Building, the Rose Garden of the Shoreham, and at the Naval Alumni House at Annapolis. Other social highlights will be a viewing of the "Sunset Parade" at the Marine Corps Barracks and a tour of interesting points at Annapolis. The annual dinner dance is to be held in the Terrace Banquet Room of the Shoreham.

For the fourteenth consecutive year, the Junior Bar Conference will cooperate with the Conference on Personal Finance Law in dramatizing a legal problem of current importance in the broad field of consumer credit. The four members of the Junior Bar Conference who will argue before the mythical State of Franklin during this year's Annual Meeting are R. Harvey Chappell, Jr., of Richmond, Virginia, S. David Peshkin, of Des Moines, Iowa, James R. Stoner, of Washington, D. C., and Cullen Smith, of Waco, Texas.

The Supreme Court will consist of three eminent members of the Bench and Bar: Chief Judge E. Barrett Prettyman, of the United States Court of Appeals for the District of Columbia Circuit; Dean Erwin N. Griswold, of the Law School of Harvard University, and Charles H. Burton, District of Columbia lawyer and a past national chairman of the Junior Bar Conference.

Responsible for Annual Meeting arrangements are James R. Stoner, Walter F. Sheble, Edward F. McKie, Jr., and John E. Nolan, Jr., all of Washington, D. C.

Advance registration for the Annual Meeting closed as of August 1. Current registrations may be made at the Statler-Hilton in Washington, D. C., beginning August 26. Registration fee for Conference members is $25. All meetings of the Junior Bar Conference will be held at the Shoreham August 25 through August 30.

Candidates Petition for National Office

Conference elections will be held on August 27 for Executive Council members from the Second, Fourth, Sixth, Eighth, Tenth and Twelfth Districts and on August 29 for the three national officers.

Under Conference By-Laws, June 26 was the deadline for filing petitions for election to office. Those filing by June 26 are as follows: Chairman—William Reece Smith, Jr., of Tampa, Florida; Vice Chairman—Kenneth J. Burns, Jr., of Chicago; Secretary—James R. Stoner, of Washington, D. C., and George T. Roumell, Jr., of Detroit.

For Executive Council members:

Sixth District—(1) Keith McNamara, of Columbus, Ohio; (2) George T. Roumell, Jr., of Detroit; (3) Wallace D. Riley, of Detroit.

Eighth District—Robert H. Berkshire, of Omaha, Nebraska.

Twelfth District—John C. Beaslin, of Salt Lake City.

Biographical sketches of all candidates are included in the August issue of *The Young Lawyer*.

Practicing Lawyer's guide to the current LAW MAGAZINES

Arthur John Keeffe, Washington, D. C., Editor-in-Charge

EVIDENCE: Olan C. Kohn, of the St. Louis Bar, has written a splendid piece in the June, 1959, issue of the *Washington University Law Quarterly* (Volume 1959, No. 3 pages 229-260; $1.25 a copy; St. Louis, Missouri). It is entitled "Admissibility in Federal Court of Evidence Illegally Seized by State Officers". Barrister Kohn traces the development of the silver platter doctrine from *Boyd* v. *United States* and *Adams* v. *New York* down through *Weeks* to *Wolf* and *Benanti*. Under this doctrine (which really began in *Weeks* v. *United States*) evidence obtained as a result of searches illegal under the Fourth and Fifth Amendments is competent in a federal prosecution if the illegal search was perpetrated by state officers. Federal prosecutors can then offer it on a silver platter to a federal court and jury. However, the same evidence obtained in the same illegal way cannot be admitted in a federal court if federal police perpetrated the search.

Mr. Kohn wrote his piece prior to the decisions of the Supreme Court on June 27, 1960, in *Elkins* v. *United States* (Docket 126) and *Rios* v. *United* States (Docket 52). There, Colonel Frederick Bernays Wiener (in *Elkins*) and Harvey M. Grossman (in *Rios*) won a victory that seems to have sounded the death knell of the silver platter doctrine. In two opinions (28 Law Week 4567 and 4575) by Mr. Justice Potter Stewart, the Court, five (Stewart, Warren, Black, Douglas and Brennan) to four (Frankfurter, Clark, Harlan and Whittaker) held that evidence obtained by state officers in violation of the Fourth Amendment was as incompetent as evidence thus obtained by federal officers.

And Mr. Kohn's excellent study becomes the more valuable in that at its last session on June 27, 1960, the Supreme Court took certiorari of *Pugach* v. *Dollinger* (Docket No. 968). In *Pugach* an injunction was sought in federal court against Dollinger, District Attorney of Bronx County, to prevent his using evidence obtained under the New York State wiretap law on the ground that evidence so obtained was illegal under the Federal Communications Act as interpreted in the *Benanti* case. Sitting *en banc*, the Court of Appeals for the Second Circuit in an opinion by Chief Judge Edward Lumbard over the vigorous but lone dissent of Judge Charles E. Clark denied the injunction (275 F. 2d 503).

We can look forward with interest to the outcome of *Pugach* v. *Dollinger* at the October, 1960, Term of the Supreme Court. We can also be sure that Justices of the Supreme Court of the State of New York asked to authorize wiretapping by *ex parte* orders under the New York statute will also be anxious to read what the Court has to say.

The decisions in *Elkins* and *Rios* and in the four courts-martial cases (*Bruce Wilson, Guagliardi, Singleton-Dial* and *Gresham*) at the October, 1959, Term caused Anthony Lewis of the *New York Times* in a thoughtful piece on the Fourth of July, 1960, to say that in these "landmark cases" Justices Stewart and Clark held the balance of power and were the Court's swing men. He could have added that both decisions represent a great victory for Fritz Wiener—and one richly deserved because earned by superlative advocacy. However, it is hard on me. The Colonel is so inflated by these two victories it will be fall before he assumes again his normal size.

MR. JUSTICE DOUGLAS: At Cornell Law School on April 8, 1960, Mr. Justice Douglas gave a speech in which he analyzed certain court statistics and came to this conclusion:

> The upshot of these statistics is that we have fewer oral arguments than we once had, fewer opinions to write, and shorter weeks to work. I do not recall any time in my 20 years or more of service on the Court when we had more time for research, deliberation, debate, and meditation.

I have carefully read the statistics upon which the Justice bottoms his conclusion but they do not seem to me to disprove the contrary conclusion of Professor Henry Hart of Harvard Law School discussed by this department in the May issue. As I read what the Justice said "far above Cayuga's waters", it is that the Supreme Court is not overworked in deciding twice as many cases today as yesterday because by one time-saving device or another (some of which, such as summary dispositions, are of questionable legality) it devotes less time to the job.

The Justice takes to task the *New York Times* of December 14, 1959, for saying that as of that date the Court had taken all the cases it could decide before June, 1960, so that cases taken thereafter would have to be argued at the October, 1960, term. The Justice points out that since July 1, 1954, records have been printed after cases are taken so they could not be made ready for argument before the term ends when filed as late as December.

In this connection, however, the Justice discloses that in 1958 some 269 cases were carried over to the October, 1959, term and that there has been an annual increase in this figure (208 in 1955 and 213 in 1957). He also concedes that even cases on the Summary Calendar "present tangled skeins as difficult to unravel as the multiplicity of facts in a lengthy record" and quotes Chief Justice Stone as saying that since his arrival on the bench in 1925 "the difficulty of the cases had increased".

If the matter interests you, request Mr. Justice Douglas to send you a copy of his address as I did, or order from the *Cornell Law Quarterly* in Ithaca, New York, at $1.50, the Spring issue

that carries the address. Read it and judge for yourself.

PUBLIC RELATIONS OF SUPREME COURT: Under this title Donald H. Dalton, of the Chicago and District of Columbia Bars, writes an interesting piece in the *Chicago Bar Record* for May, 1960 (address its Editor, Hugo Sonnenschein at 29 South La Salle St., Chicago, Illinois, and send fifty cents). It fortifies what Eileen Shanahan of the *Journal of Commerce* has been saying to me during my few years in Washington. The Court needs a P. R. man. Arthur Krock told Chief Justice Stone that if the Court had "a publicity agent", eight days would not have passed before the importance of its decision in *Erie* v. *Tompkins* became known. Merlo Pusey of the *Washington Post* and biographer of Chief Justice Hughes says that the *Post* did not report *Erie* until ten days later. And no wonder. As Miss Eileen Shanahan will describe to you with gestures, it is intellectual agony for the working newspaperman to be handed between noon and 2:00 P.M. bales of such long and complicated reading without any public relations assistance. The marvel is that the press does as good a job as it does.

Donald Dalton's piece is replete with instances such as the above and he concludes with this suggestion:

> The late Chief Justice Bolitha J. Laws of the U. S. District Court for the District of Columbia said:
>
> "There are two essentials of the Courts. The first is to establish and promote justice; the second is to have people know that they promote justice."
>
> The thrust of the latter requires that the Supreme Court should give its press officer wider latitude in press matters, in interpreting the Court to the public as recommended by Arthur Krock of the New York Times, when Erie Railroad Company v. Tompkins was decided; the Judicial Conference of the United States should have a definite public relations policy in informing the public on the work of the Supreme, Circuit, and district courts; the American Bar Association should have an independent legal commentator in Washington to interpret the decisions of the Court as they are released by the Chief Justice on decision day; newspapers, news media should be encouraged to give more adequate and intelligent coverage of the Supreme Court.
>
> Our law schools and journalism schools should help in this matter.

TRIAL LAWYERS: All of us who grew up in the law on the cliffs of Manhattan as slaves of the great law shops are frustrated criminal lawyers. We read *The Great Mouthpiece* of the late Gene Fowler and we regularly watch Perry Mason kick District Attorney Burger around on the idiot machine. Having read so much about his exploits in the papers and magazines and heard so many reports with respect to his law school lectures from my students, I was delighted to read in the *New York State Bar Bulletin* (pages 155-160) for June, 1960 (write John E. Berry, its able Editor, 99 Washington Avenue, Albany 10, New York, and send fifty cents), the address Edward Bennett Williams gave to the Trial Lawyers Section of that bar association on January 30, 1960.

As you would expect, Lawyer Williams' favorite topic is the American Bill of Rights. He discussed the Northwestern University poll that showed college political science majors "did not believe in the peaceful right of assembly", confrontation, double jeopardy or self-incrimination, yet each believed in the American Bill of Rights *in toto*. Mr. Williams spoke in praise of the decisions of the Supreme Court in *Brown* v. *Board of Education, Yates, Watkins, Jencks, Slochower, Benanti* and *Roviero* but said nothing about *Uphaus, Barenblatt, Nelson* and the cases under the *Jencks* statute. A good discussion of the cases except for the need to up-date *Watkins, Jencks* and *Slochower*.

However, it is one of the most charming articles I have read in two respects.

First, Mr. Williams tells how on All Saints Day in 1586 in the Tower of London, Blessed Edmund Campion on a bed of straw invoked the privilege against self-incrimination now embalmed in the Fifth Amendment. And how, in 1606, twenty years later, Father Henry Garnett, the Jesuit Provincial for England did the same before the High Commission Court. This gives the Fifth an ecclesiastical imprimatur, the validity of which I have some doubt.

Second, at the request of "Whitney Seymour" (Senior or Junior?), Mr. Williams tells this sacrilegious story:

> I was introduced to speak at the annual dinner of the Holy Name Society of Washington, D. C. The presiding officer of the evening by way of introducing me, identified me as the lawyer who had at one time or another represented Costello, Hoffa and Icardi.
>
> During the course of the evening, I asked why he had singled out these particular clients as a means of introducing me. He said he was very sorry if I was offended but these were the only ones he knew who were members of the Holy Name Society [page 155].

Thereafter, Mr. Williams follows this story with another good one that goes this way:

> Then on a lower level, I took a walk over the holidays in the neighborhood with my son. We bumped into a new neighborhood chum of his, and he said, "Daddy, this is Pottsy Stewart. His dad is on the Supreme Court."
>
> And then by way of introducing me, he said, "Pottsy, this is my Daddy. He's a real lawyer. He gets Christmas cards from people in jail" [page 155].

From all of which, I conclude that

maybe Edward Bennett Williams has missed his calling. He would seem to be a better after-dinner speaker than Chauncey Depew or Learned Hand. Too bad there's no money in it.

PERPETUITIES: It is a good thing for Professor Robert S. Pasley, of Cornell Law School, that Surrogate James A. Foley is up in Heaven talking politics with John F. Murtaugh, of Elmira, New York, and Al Smith and Bob Wagner. Pasley has just made the mistake of joining Professor John Winchester MacDonald of Cornell, Chairman of the New York State Law Revision, in cleaning up what we have been wont to call Foley's Folly. Long ago in 1936 and 1938, the late Professor Horace E. Whiteside, of Bell Buckle, Tennessee, and Cornell, and Professor Richard R. Powell, of Columbia, and Mrs. Laura Mulvaney, Director of Law Revision Research, suggested in two excellent studies that the law of New York be changed so that the ordinary lawyer could draw a legal trust. Protected by Surrogate Foley, the then peculiar law was that trusts must be measured by *two* lives in being. Despite the Brain Trust of Whiteside, Powell and Mulvaney, aided and abetted by MacDonald, thus the New York law remained until Jim Foley passed away.

At long last in 1958 the Law Revision recommendations were accepted by the New York Legislature but as might be expected after so long a wait, the Commission took any change it could get. Pasley has risked his neck with Foley's ghost by restudying the new law and suggesting needed changes. Now adopted, it could be a lawyer thirty years at the Bar can draw a legal trust in New York without hiring Harry Tweed. Down to 1958, you had to be a Tweed to understand the New York decedents' estates law. I never will forget how Tweed won a new suit he did not need from Colonel Joseph M. Hartfield by keeping irrevocable trusts irrevocable. The law has wheels within wheels. Suffice to say the old studies of 1936 and 1938 and the new ones of 1959 and 1960 by Pasley can be found in the Reports of the New York State Law Revision Commission. However, these reports are so valuable they get out of print quickly. Bob Pasley is leaving the country to spend the year on a Ford grant in Paris. He will thus be safe from the ghost of Foley when in his absence the *Cornell Law Quarterly*, Myron Taylor Hall, Ithaca, New York, publishes in two parts in its summer and fall issues ($1.50 a piece) an article based on his invaluable law revision studies. Every estate lawyer should have it. Even Charlie Cassidy in Honolulu, Hawaii, will find invaluable the Pasley study that really updates the splendid older ones.

The new laws are Chapters 450, 451, 452 and 458. And in his Cardozo Lecture at the House of The Association of the Bar, 42 West 44th St., New York 36, New York (October 27, 1955, Vol. 11, No. 1, January, 1956) *The Record;* (price 50 cents) Harry Tweed tells how after sticking Colonel Hartfield for a new suit, he tried in vain to get Judge Crane to change a paragraph in his opinion. His effort ended when, in disgust, Crane told him (as Thurman Arnold recently told the world), "I had to put that paragraph in to secure a majority in your favor" (page 14).

PRACTICAL LAWYER: 'Tis a mystery to me how Paul A. Wolkin, the Editor of *The Practical Lawyer*, month after month manages to gather together under one tent such consistently good and genuinely practical articles. For instance, in the October, 1959, issue, the piece that caught my eye was the one by Professor Mortimer M. Caplin of Virginia Law School on what is "Doing Business". Over a long period I have wondered how a corporate lawyer such as Mr. Caplin would advise a corporation when to file in a foreign state and when not to do so.

I am glad to see that Professor Caplin has written a book on the subject, "Doing Business in Other States" published by the United States Corporation Company of the City of New York. His article in the October, 1959, *Practical Lawyer* ($2.00 a single issue, $8.00 a year, 133 South 36th Street, Philadelphia 4, Pennsylvania) is based on materials in his book. As you might expect he discusses many old friends, *Pennoyer* v. *Neff*, *International Shoe*, *McGee* and the recent *Hanson* v. *Deckla* in the process field. Even more interestingly, he also discusses the tax cases of the 1958 Term, *Allied Stores*, *Youngstown Sheet and Tube*, *United States Plywood*, *Railway Express Agency*, *Northwestern States Portland Cement* and *Williams* v. *Stockham*

Valves in the light of the older ones, namely, *West Publishing*, and *Spector Motor Service*.

It is too bad that after he wrote the Congress passed its new "Doing Business" statute (Senate Bill 2524 of the 86th Congress signed by the President on September 14, 1959) so that the reader does not have the benefit of Professor Caplin's interpretation of it. Let's hope that he will follow in *The Practical Lawyer* with a treatment of this new statute. As an antitruster I would also like to think Professor Caplin might have time to tell us when a corporation transacts business sufficiently to be sued in a state in which it is not either authorized to do business or obligated to register.

PROFESSIONAL NEGLIGENCE: The *Vanderbilt Law Review* in its June, 1959, issue (Vol. 12, No. 3; $2.00; Nashville 5, Tenn.) has one of its invaluable symposium issues devoted to this subject. Professor William J. Curran of the Law-Medicine Institute of Boston has a foreword. Professor Allan H. McCoid of Minnesota Law School, Professor John G. Fleming of Canberra Law School, Australia, Fitz-Gerald Ames, Sr., of the San Francisco Bar, and Bernard D. Hirsh, an attorney with the American Medical Association, all write on various aspects of medical liability. Professor George Savage King of South Carolina Law School writes on the liability of pharmacists; Professor George M. Bell of Idaho Law School on architects and engineers; Professor Paul O. Proehl of the University of Illinois Law School on teachers and Dean John W. Wade of Vanderbilt Law School on the liability of us poor lawyers. Henry S. Drinker, of the Philadelphia Bar, writes on Canons 28 and 29—how far they should deter you from participating in proceedings against a fellow lawyer.

To make the issue complete Professor Thomas G. Roady, Jr., of Vanderbilt Law School writes on public accountants, and two student editors, Edgar E. Smith on funeral directors, and Jack D. McNeil on insurance agents. An unusual collection of valuable studies.

TAXATION: Annually *Western Reserve Law Review* publishes a tax symposium that every lawyer everywhere will find helpful. This year's March, 1960, issue carries it (Vol. 11, No. 2; $1.50; Western Reserve Law School, Cleveland 6, Ohio) and it is up to the high standard of last year. It is devoted to "Tax Problems Incident to the Acquisition of Real Estate" and based upon a series of lectures at the Second Annual Cleveland Regional Tax Institute sponsored by the Cleveland Bar Association on October 24, 1959. Robert L. Merritt and Herbert B. Levine and the law review staff are responsible for the publication.

Richard Katcher, of the Cleveland Bar and Western Reserve faculty, writes on "Determining the Form of the Acquiring Entity, the Method of Acquisition and the Type of Financing"; Warren E. Hacker, of the Cleveland Bar, on allocation of costs and property taxes; Norman H. Sugarman, of the Cleveland Bar, on rent; Howard M. Kohn, of the Cleveland Bar and Western Reserve faculty, on leasehold improvements; Norman T. Patton, of the Cleveland Bar, on casualty losses, repairs and depreciation; Alan R. Vogeler, of the Cincinnati Bar and Salmon P. Chase Law School, on the management of acquired real estate, specifically its operation; and, doubling in brass, Messrs. Katcher, Sugarman and Kohn also write on problems incident to the disposition of realty. A fine issue.

TAXATION OF SCHOLARSHIP GRANTS: The *Washington University Quarterly* (Volume 1960, No. 2; single copy $1.50; Washington University Law School, St. Louis, Missouri) for April, 1960, has a corking article of interest to every professor who receives a scholarship or fellowship grant. It is entitled "Scholarship and Fellowship Grants as Income: a Search for a Treasury Policy" and it is written by Professor Donald H. Gordon of Wayne State University School of Law in Detroit, Michigan. The problem is the meaning of Section 117 of the Internal Revenue Code of 1954. Law professors, just like lawyers like Harry Tweed, suffer so much tax injustice. It is A, B, and a law professor as "the unfortunate Tweed".

Professor Gordon traces the legislative history of Section 117 but I regret to report he finds "The Treasury in its interpretation of the section has not thus far utilized its opportunity because it has failed to change its outlook on the nature of these problems. It has continued to make its chief reference the polar terms 'compensation' and 'gift' rather than the essentially unique function and characteristics of scholarships themselves." Professor Gordon wants "a change" in outlook to "take the form of a recognition [and understanding] of the function of these kinds of payments and the way in which they are administered".

No law professor should accept an invitation to an audit of his tax return without Gordon's opus under his arm. Pity the auditor then.

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